Supreme Court, U.S.
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No. ——

In the Supreme Court of the United States

MICHAEL SHOELS AND VONDA SHOELS, AS PARENTS OF DECEDENT ISAIAH SHOELS,
Petitioners,

v.

THOMAS KLEBOLD, SUSAN KLEBOLD, WAYNE HARRIS, AND KATHERINE HARRIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Have the petitioners been deprived of their constitutional right to a jury trial under the Seventh Amendment by the refusal of the Tenth Circuit Court of Appeals to reverse the district court's order granting motions to enforce settlement agreement and to remand back to the Colorado state court for a jury trial on the merits?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here, are disclosed in the caption of the case. Petitioners are individuals, the parents of Isaiah Shoels, deceased.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the order rendered in this case by the United States District Court for the District of Colorado and affirmed by the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The August 24, 2004 order denying rehearing and rehearing en banc is unreported, but it is printed at App. 1a-3a. The July 21, 2004 panel opinion for the Tenth Circuit is reported at 375 F.3d 1054 (10th Cir. 2004) and is reprinted at App. 4a-33a. The June 23, 2003 order of the United States District Court for the District of Colorado is unreported, but is printed at App. 34a-45a.

STATEMENT OF JURISDICTION

The Tenth Circuit issued its order denying rehearing and rehearing en banc on August 24, 2004. This petition for certiorari is timely in that Petitioners have filed it within 90 days of August 24, 2004. The Court has jurisdiction pursuant to 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Petitioners rely upon the Seventh Amendment of the Constitution of the United States which provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of

the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

I. Overview of the Case

This case arises out of the April 20, 1999 shooting death of Petitioners' son, Isaiah Shoels, who was among those killed at Columbine High School by Dylan Klebold and Eric Harris. Respondents are the parents of Klebold and Harris. Petitioners filed suit in Jefferson County, Colorado alleging Colorado state law negligence claims against the Harrises and the Klebolds. The counts against the other, now dismissed, defendants included 42 U.S.C. §1983 claims that resulted in the case being removed to the United States District Court for the District of Colorado pursuant to 28 U.S.C. §1441 and 28 U.S.C. §1443. The case was assigned to Chief Judge Lewis T. Babcock. Aside from the Respondents, all of the other defendants in Petitioners' lawsuit have now been dismissed with prejudice.

Petitioners' lawsuit was filed by Michigan attorney Geoffrey N. Fieger and by local Colorado counsel Jack Beam and Doug Raymond. On June 23, 2003, over Petitioners' strenuous objections, the district court found that in April 2001, Petitioners, through counsel, entered into a binding agreement with Respondents to settle their claims (App. 44a). On July 21, 2004, the Tenth Circuit affirmed in an opinion by Judge Michael W. McConnell and joined by Judges David M. Ebel and Stephen H. Anderson (App. 33a).

II. The Settlement Discussions And The District Court Decision

On June 13, 2000, Mr. Beam wrote a letter to Michael Montgomery, counsel for the Harrises insisting that all contact with the Shoels' counsel be in writing. Mr. Montgomery responded the same day acknowledging that communication between the attorneys would be restricted to correspondence and faxes. Mr. Fieger knew that Mr. Beam and Mr. Montgomery had agreed that any settlement negotiations between Respondents' attorneys and Petitioners' attorneys were to be in writing. No direct settlement negotiation written communications ever took place.

On June 29, 2000, Mr. Beam wrote to Frank Patterson, counsel for the Klebolds demanding policy limits on behalf of both Petitioners and the Taylors, whose minor son was also injured at Columbine, and who were also represented by Beam, Raymond and Fieger. The demand was rejected by the Klebolds.

Subsequently, Petitioners' attorneys were contacted by attorney Steven Wahlberg, an attorney, who represented other injured Columbine claimants against Respondents. Mr. Wahlberg had assumed the informal role of spokesperson for some 36 claimants against the Respondents. Mr. Beam specifically cautioned Mr. Wahlberg in his October 2, 2000 letter **that the Shoels would not decide whether they wanted to commit to any settlement "until they know what they would receive as a result of the settlement for the death of their son, Isaiah"** (emphasis added). At no time did Mr. Wahlberg act as an attorney for Petitioners. He was only a messenger.

In response to Mr. Wahlberg's earlier September 2000 demand to the Respondents for policy limits, in November 2000, he received a letter from Mr. Montgomery and others indicating that the Respondents were prepared to enter into settlement negotiations but they wanted everyone who had received a physical injury at Columbine to participate. As a condition precedent to any settlement, Respondents also demanded the execution of a full release from the victims and their families against all claims, plus a signed confidentiality agreement which Petitioners never signed.

At about this time, Mr. Wahlberg contacted the Judicial Arbiter Group ("JAG") and they began working on two processes - - the distribution of funds to victims through JAG and achieving settlement with the defense lawyers. JAG became involved when former United States District Court Judge Jim Carrigan was asked to serve as a private special master to assist in the resolution of the claims. The procedure included a formula to apportion the proceeds that were to be paid by Respondents. But no one could tell Petitioners exactly how much compensation they would receive based on the arbitration agreement.

On January 4, 2001, Mr. Wahlberg faxed correspondence to Petitioners' attorneys stating that **"We need a signed and binding agreement to arbitrate"** and "We will need proposed full and final releases from the defendants" that Mr. Montgomery was to present for Respondents' review (emphasis added). Thereafter, on about February 19, 2001, Mr. Wahlberg advised Respondents' counsel that Petitioners asked to be included in settlement negotiations, but **"they have not made a final decision about accepting a settlement and signing a release** (emphasis added). Petitioners' attorneys received an agreement to arbitrate form from JAG, but they never returned a signed agreement to participate in

the arbitration. **JAG's understanding per its President Jerry Lockwood "was that nothing was to proceed with individuals, regardless who it was, Shoels or otherwise, until the documents were signed"** (emphasis added).

In early 2001, there were two separate settlement discussions going on - - the first with the Anderson, Manes and Duran defendants, and the second with the Respondents. The Anderson/ Manes/Duran defendants were insisting that all plaintiffs must participate in any settlements with them. The Rouse clients who were also plaintiffs were not participating in any of the settlement discussions, but Petitioners were included in the negotiations even though they had made no final decision about accepting a settlement and signing a release.

On March 8, 2001, Mr. Wahlberg spoke to Mr. Fieger who again made it clear that **Petitioners had not agreed "to anything other than to be included in the arbitrations"** (emphasis added). Mr. Fieger also proposed that all the death claims should be treated as a class at the maximum statutory amount and all plaintiffs subsequently concurred. Nonetheless, no one had any idea how much money would be in the arbitration fund or how much any claimant would receive.

On April 13, 2001, Mr. Wahlberg faxed an Agreement for Arbitration **"which needs to signed by the Schoels [sic] family." His cover letter added, "we need the Schoels' [sic] signatures to proceed"** (emphasis added).

On April 16, 2001, Mr. Wahlberg faxed correspondence to Petitioners' attorneys about the two settlement discussions. He wrote that Respondents had $1.6 million for settlement purposes, that they were withholding two percent ($32,000)

for zone of danger claims and that the balance of $1.568 million would be subject to an analysis to be done by Judge Carrigan of the Rouse's group's claims and those of the unrepresented families. The faxed letter also contained separate paragraphs discussing the status of negotiations with Duran and Anderson. Attached to it was a written proposal from Manes, but Mr. Wahlberg's letter admitted that there was still no firm offer to settle from Anderson.

The April 16, 2001 letter again recognized that **"We also do not have the signed agreement to arbitrate from the Shoels**. . ." (emphasis added). The faxed letter closed with the statement, "Hopefully, we will reach a final agreement with Harris, Klebold, Anderson, Manes, and Duran by the end of the week".

On April 18, 2001, Mr. Wahlberg spoke by phone to Mr. Raymond and told him that the Rouse group had agreed to participate in the Duran/Anderson/Manes settlement, and "we needed to know what the Shoels are doing." Later, Mr. Wahlberg spoke to someone in Mr. Fieger's office and again stated that he needed a writing as to whether the Shoels were settling with Duran/Anderson/Manes since everyone else had agreed to that settlement. The focus of this conversation was on the Duran/Anderson/Manes proposal, not Respondents' proposal. Duran/Anderson/Manes were insisting on one hundred percent participation by all plaintiffs.

Based on Mr. Wahlberg's conversation with Doug Raymond on April 18, 2001, Mr. Wahlberg was under the impression that the Shoels would probably settle with Duran/ Anderson/Manes. But, when Mr. Wahlberg received the April 19, 2001 letter from Mr. Fieger's office, he took it to be an acceptance of settlement with the Harrises/Klebolds too.

On April 19, 2001, Mr Fieger's office faxed correspondence to Mr. Wahlberg stating, "This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson and Duran." Mr. Wahlberg faxed this correspondence to the Respondents the same day.

Mr. Fieger testified at the March 14, 2003 evidentiary hearing that the letter was signed with his name by his assistant Lisa Macavey. He was in trial at the time, and he received a call from Ms. Macavey, who had spoken to Mr. Wahlberg that morning. The focus of the conversation was on Mr. Wahlberg's insistence that everyone needed to participate because Anderson was threatening bankruptcy. Specifically, Ms. Macavey told Mr. Fieger that Mr. Wahlberg needed to know whether "we would agree to participate in the process because otherwise the defendants wouldn't be willing to - - one of the defendants was going to go into bankruptcy". Mr. Wahlberg had told Ms. Macavey of Anderson's threatened bankruptcy.

Mr. Fieger did not dictate a letter to Ms. Macavey, but he instructed her to write a letter "indicating that we will - - we are not ruling ourselves out of participating in this process". But, Ms. Macavey wrote the letter indicating that Petitioners have approved settlement with Klebold, Harris, Manes, Anderson and Duran. This was absurd because when Macavey wrote the letter, Anderson had not even made a formal offer. At this point, Petitioners' attorneys also believed that the Rouse group had now agreed to participate in the settlement process with respect to the Respondents as well.

When Mr. Fieger arrived back at his office later that day and learned what the letter Ms. Macavey had sent said, he

then spoke with Mr. Raymond and also learned that the Rouse group had not agreed to participate in the Respondents' settlement process. Mr. Fieger immediately called Mr. Wahlberg and advised him of the error and that Petitioners were not settling any claim. Mr. Fieger "couldn't tell Petitioners what was being offered to them" and "they wouldn't sign any agreement". Mr. Wahlberg told Mr. Fieger that he understood. Petitioners had always insisted that until they saw the final payout numbers, they would not decide whether to participate in any settlement.

On April 20, 2001, Mr. Raymond followed up Mr. Fieger's phone call to Mr. Wahlberg with a letter stating that "we were shocked" that there was a settlement that did not include the Rouse's group as to Respondents because the last conversation was that "everybody is on board except the Shoels". Mr. Wahlberg wrote back to Mr. Raymond confirming that the Rouse group was not participating in a settlement with Respondents, and, for the first time, he disclosed to Petitioners' attorneys the additional terms of the "full deal" with the Respondents. Mr. Raymond immediately wrote back to Mr. Wahlberg again reiterating that their "last conversation was that Respondents were the only ones who weren't 'on board.'

On April 23, 24 and 25, 2001, Mr. Wahlberg wrote letters to Mr. Fieger acknowledging that no agreement had been finalized, that the exact amount of money Petitioners would receive was undetermined, and, on April 25, 2001, he specifically confirmed that Petitioners "are not required to settle with the Harrises and Klebolds families if they choose not to." As Mr. Wahlberg's April 23, 2003 letter to Mr. Fieger made clear, the exact settlement amount remained unknown:

> "At this time no one knows what they will receive because Judge Carrigan has not entered his Distribution Order.
>
> * * *
>
> Another variable is that we don't know the actual amount of funds in the escrow account."

Moreover, settlement of the Anderson claim still remained. On April 24, 2001, Mr. Wahlberg advised Mr. Fieger that there was now "a firm offer" from Anderson in the amount of $285,000. But, in response to Petitioners' inquiry about the settlement range for the wrongful death claims, Mr. Wahlberg reiterated, "The quick answer is that we don't know. Petitioners' attorneys wrote four more letters over the next three months reiterating that there was no settlement with Respondents.

Petitioners did ultimately agree to settle with the Duran/Anderson/Manes defendants and executed a Settlement Agreement on August 28, 2001, but only after they were informed exactly what monies they would receive did they execute that agreement which also specifically excluded Respondents. Further, everyone including the Rouse group participated in the Duran/Anderson/Manes settlement.

Judge Carrigan did not issue his Distribution Order until the Summer of 2001. Respondents did not actually escrow the settlement monies until October 2, 2001. Petitioners never accepted any settlement funds from Respondents.

Well over a year after the purported settlement, in June 2002, Gary Lozow, a personal attorney for the Klebolds, called and wrote Mr. Fieger with a settlement overture. Mr. Lozow was concerned with the possibility that the Klebolds might face exposure beyond their insurance. When Mr. Fieger advised him that Petitioners were not interested in

further settlement discussions, Mr. Lozow informed the Klebolds' insurance attorneys.

Respondents moved in July 2002 to enforce the April 19, 2001 letter, and after Petitioners opposed the motions, Chief Judge Babcock entered an order transferring the case to Judge Robert E. Blackburn for the limited purpose of resolving the motions to enforce settlement. The facts set forth above are taken from the evidentiary hearing held on March 14, 2003.

On June 23, 2003, Judge Blackburn entered his Order Granting Motions To Enforce Settlement Agreement (App. 44a). He found that Respondents proposed a settlement to Petitioners which contained the essential terms of a settlement agreement "when they negotiated the terms of an arbitration agreement, including a stipulation that all death claims would be treated equally, with counsel for the Shoels and other plaintiffs' counsel" (App. 39a). The judge further found that "the Shoels accepted these terms when Mr. Fieger faxed his letter dated April 19, 2001, to Mr. Wahlberg" (App. 40a).

III. The Court of Appeals Opinion

On July 21, 2004, the Tenth Circuit affirmed the district court (App. 33a). The court rejected Petitioners' argument that they never gave their attorney express authority to settle their claim, or alternatively that the terms of the settlement were too vague to constitute a binding agreement and that, at most there was a preliminary agreement to agree. Finding no clear error, the court also found that Respondents' committed a unilateral mistake which entitled them to no relief. Petitioners' motion for rehearing/rehearing en banc was denied by the Tenth Circuit (App. 2a).

REASON FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ or certiorari. One of these considerations is whether the Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power ...."

That consideration is present in this case. In a number of cases the Supreme Court has stated that right of jury trial in civil cases is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. Hodges v. Easton, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882) [stating that the Seventh Amendment is a fundamental guaranty of the rights and liberties of the people]; Jacob v. New York City, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942); See DeZon v. American President Lines, Ltd., 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943), reh den 319 U.S. 780, 63 S.Ct. 1025, 87 L.Ed. 1725 (dissenting opinion by Black J.)]. In the federal system, the United States Constitution, pursuant to the Seventh Amendment, commits the trial of facts in a civil cause to the jury which becomes the principal factfinder, charged with weighing th evidence, judging the credibility of witnesses, and reaching a verdict. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed2d 660 (1991). A personal injury action is a prototypical example of an action at law, to which the Seventh Amendment right to jury trial applies. Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991).

Here, in the frenzied rush to erase the tragedy of the Columbine murders from Colorado's and the nation's collective memory, the district court imposed a settlement on the family of Isaiah Shoels based on a hastily faxed, one sentence, twenty-two word letter from their attorney's office. Attorney Geoffrey Fieger rescinded that letter the same day as a mistake. Neither Mr. Fieger, nor the Petitioners themselves ever approved a settlement with Respondents.

The unknown essential detail of exactly how much money Petitioners were to receive for the death of their son Isaiah, was an often-stated condition precedent to any settlement acceptance by the family. The oral proposal presented by telephone to Mr. Fieger's legal assistant was so lacking in that essential detail that there was not even a bona fide settlement offer to present to Petitioners. The confusing oral proposal was so indecipherable that the alleged go-between Steven Wahlberg (who had no authority to bind any party) was still trying to explain its essential terms 15 months later.

Respondents never detrimentally relied on the mistakenly worded letter. Petitioners themselves never signed any agreement with Respondents or acknowledged any settlement in open court. Notwithstanding everyone's desire to relegate the Columbine tragedy to a historical footnote, under the express language of the Seventh Amendment, the Petitioners are entitled to their day in court and their constitutional right of trial by a jury. The decisions below represent a gross miscarriage of justice that warrants the Court's review.

I. Petitioners Were Denied Their Seventh Amendment Right To A Jury Trial Where They Themselves Never Executed An Agreement To Settle With Respondents And Where The Essential Terms Were Too Indefinite To Permit The Formation Of A Contract.

The circuit court panel affirmed the district judge who specifically rejected Petitioners' argument that the terms of any proposed settlement with Respondents were too indefinite to permit the formation of a contract for settlement. In doing so, the district judge erroneously held that the Petitioners agreed to settle if the death claim of Isaiah Shoels was valued at the Colorado wrongful death statutory maximum of $366,000 (App. 40a-41a). This is simply not true, and the ruling deprived Petitioners of their right to a jury trial.

It is absolutely clear from the record that the arbitration agreement had to actually be signed by Petitioners. Review of that agreement establishes that it did not contemplate simply an attorneys' signature; it actually also required the Petitioners' signature. Indeed, paragraph IV, Binding Effect (B), specifically requires that the Agreement be signed by the Claimant in order for it to have any binding effect. But, Petitioners' attorneys had repeatedly made it clear that Petitioners would not sign anything until they knew the exact dollar amount of any proposed settlement.

Thus, on October 2, 2000, Mr. Raymond's letter advised Mr. Wahlberg that Petitioners would not decide whether to commit to any settlement "until they know what they will receive from the settlement from the death of their son." On February 19, 2001, Mr. Wahlberg wrote to defense counsel that Petitioners had asked to be included in the JAG negotiations but "they have not made a final decision about accepting a settlement and signing a release." On March 8,

2001, Mr. Wahlberg spoke to Mr. Fieger who again advised Wahlberg that Wahlberg had no authority "to bind Petitioners and that the Shoels were not agreeing at that point to anything other than to be included in the arbitrations as we go forward."

The district court's opinion referred to the April 13, 2001 letter from Mr. Wahlberg to Mr. Beam with the proposed arbitration agreement, but the court completely ignored Mr. Wahlberg's statements in his cover letter that the agreement "needs to be signed by the Schoels (sic) family" and that "we need the Schoels' (sic) signatures to proceed." In fact, both before and after the April 19, 2001 letter, Petitioners refused to sign the agreement to arbitrate because, while they were "always open to hearing some final numbers," it was only when the final numbers were determined that "people could decide in effect to opt in or opt out." It was not until Mr. Lozow's June 6, 2002 letter to Mr. Fieger that anyone told Petitioners the exact amount they would be entitled to. Because the Arbitration Agreement was never signed by Petitioners, no settlement agreement could be effectuated by the April 19, 2001 letter.

The Tenth Circuit compounded this error. The panel's July 21, 2004 decision repeatedly references Mr. Wahlberg's April 16, 2001 letter as part of the offer to settle. The letter was sent to Petitioners' local counsel Jack Beam and reiterated that the Rouse plaintiffs were not participating in any settlement with Respondents (App. 9a). But, Mr. Fieger, the decisionmaking attorney and the only attorney in contact with Petitioners, never received that "offer." He was twice removed from Respondents and the "proposal," such as it was, went first through Mr. Wahlberg and then through Mr. Beam.

Mr. Fieger testified that, during the April 16-19, 2001 time period, he never saw the April 16 letter which the panel said was the offer. Careful review of the fax cover sheet by which Mr. Beam's office attempted to send Mr. Fieger the April 16, 2001 letter, which the district court and the appellate panel said was the offer, proves Mr. Fieger's testimony - - the fax was sent to **(810)** 355-5148, but Mr. Fieger's office fax machine is at **(248)** 355-5148. Thus, all the evidence irrefutably establishes that what Mr. Fieger believed he was responding to was nothing more than a telephoned proposal for Petitioners to "participate" in the settlement process. The panel erred at law under the Colorado cases setting the parameters for contract formation by declaring that the April 16 correspondence that Mr. Fieger never saw was the offer that he accepted by his legal assistant's erroneously worded April 19, 2001 letter.

The panel also wrongly dismissed Petitioners' argument that they had consistently refused to settle without knowing in advance the ultimate dollar value they would receive. For example, the panel stated that "Parties often relax their supposedly nonnegotiable demands over the course of the negotiations..." (App. 15a). Yet, there is not one scintilla of testimony in the record that Petitioners ever dropped this unwavering demand to know the ultimate dollar amount. Later, in section III of the panel's opinion, the court of appeals held that it was reasonable to conclude, without any overt sign that they had done so other that the mistaken April 19, 2001 letter, that Petitioners had dropped this previously critical condition precedent, but that looking at this issue from Respondents' perspective, it was unreasonable as a matter of law for Petitioners to conclude that Mr. Wahlberg's "everyone else" had signed the agreement statement, included the Rouses.

Accordingly, the purported settlement agreement should not have been enforced for two reasons, Petitioners never authorized it by giving their signatures, and the "agreement" failed because its essential terms were too indefinite to permit enforcement.

A. Petitioners Were Unconstitutionally Deprived Of A Jury Trial Where The Decisions Below Enforced A Settlement Despite Absolutely Clear Evidence That Petitioners Never Gave Mr. Fieger Authority To Settle With Respondents Without Petitioners First Knowing The Exact Dollar Amount That They Would Receive.

For more than a hundred years, the settled rule in Colorado has been that "an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client." Hallack v Loft, 19 Colo. 74, 80, 34 P. 586, 570 (1893); Cross v The District Court In and For the First Judicial District, 643 P.2d 39, 41 (Colo. 1982); Radosevich v Pegues, 133 Colo. 148, 152, 292 P.2d 741 (1956); Lewis v Vache, 92 Colo. 358, 361, 20 P.2d 554 (1933) [attorney may not compromise his client's cause without express authority]. In Hallack, the Court stated that an attorney's duty is to maintain, not to sacrifice, his client's cause:

> "By virtue of his retainer he may do everything fairly pertaining to the prosecution; but an agreement to surrender or compromise any substantial right of his client is beyond the scope of his employment, and is not binding without express authority" (citations omitted).

More recently, in Cross, the Colorado Supreme Court reiterated:

> "It is also well-established that an attorney who is clothed with no other authority than that arising from his employment as attorney has no implied authority by virtue of his general retainer to compromise and settle a claim of his client." Citing Annot. 30 A.L.R. 2d 944 at §2 superseded by 90 A.L.R. 4th Authority of Attorney to Compromise Action; 7 Am. Jur. 2d Attorneys at Law §156 [now §173 (1997)].

In Cross, plaintiff was shot by Harger who was both charged criminally and then sued civilly by plaintiff. The cases were assigned to the same judge, and when Harger entered a plea bargain, the judge at sentencing inquired of an associate [Lampert] from the office of plaintiff's attorney as to what effect an order of restitution in the criminal case would have on the civil action. 643 P.2d at 40. Based on the Lampert's statements, the judge considered them an agreement to settle the civil case. The district court upheld the Lampert's statements as a settlement, despite the fact that within hours after the hearing, he telephoned civil defense counsel (who had not been present at the criminal proceeding) and advised him that it was not his intent to settle the civil case and that he did not have authority from Cross to do so. Id.

The Colorado Supreme Court held that Lampert had no authority to settle or compromise the civil action and that there was no evidence of ratification by Cross. The court concluded that "it would be inequitable to enforce an agreement for compromise and settlement which was a mistake on the part of Lampert." 643 P.2d at 41-42. Cross is on all fours with the present case. Mr. Fieger disavowed his assistant's April 19, 2001 letter within hours of its receipt.

Lisa Macavey, who is not an attorney, had no authority, express or otherwise, to settle Petitioners' claims. It is abundantly clear and undisputed that Petitioners always insisted that they were to be apprised of the exact dollar amount of any settlement before they would decide whether to compromise the wrongful death claims. Here, it would be inequitable to enforce the compromise that was the product of such a mistake.

Indeed, in Radosevich, 292 P.2d at 743, the court said that "even though [an attorney] purposely and intentionally tries "to compromise or settle without express authority, he is without power to do so. Factually, Radosevich was sued for personal injuries by Pegues following an auto accident in which Radosevich's wife was killed. He counterclaimed and was defended by his insurer's attorney who also agreed to handle the counterclaim as Radosevich's private attorney. When the insurance company paid Pegues $1,500 to indemnify Radosevich, the judge decided that the counterclaim was also dismissed even though Radosevich had no knowledge whatever of the "settlement," and even though none of the parties intended to settle the counterclaim and in fact they expressly provided to the contrary.

Citing Lewis v Vache, supra, and Hallack v Loft, supra, the Radosevich court, in reversing, said:

> "It would be strange logic indeed to hold that though a lawyer definitely intended not to compromise his client's cause, yet the law would imply an intent to do the very thing which it holds he was without power to do, and would work a result exactly opposite to that which was intended." 292 P.2d at 743-744.

Petitioners submit that here it is even stranger logic to hold that a legal assistant can compromise their case in the face of their well known and consistent position taken throughout the settlement discussions that they would not, under any circumstances, authorize a settlement without first knowing the exact dollar amount they were to receive.

The Tenth Circuit has recognized and applied Colorado's well-settled rule holding that an attorney must have express authority to settle his client's claims. See Thomas v Colorado Trust Deed Funds, Inc., 366 F.2d 136, 139 (10th Cir. 1966). In Thomas, defendants James Thomas and Boyd Thomas sought to reopen a judgment. The court held that the attorney representing the brothers had the express approval of James, but not of Boyd, to make the proposed settlement. The court found that the district court abused its discretion in holding that the lawyer had the authority to settle the case without the express authority of Boyd Thomas. Accord: Heuser v Kephart, 215 F.3d 1186, 1189, n 3 (10th Cir. 2000) [applying New Mexico law]; Hayes v Eagle-Picher Industries, Inc., 513 F.3d 892, 893 (10th Cir. 1975) [Kansas law].

Here, the evidence makes it absolutely clear that Petitioners never gave Mr. Fieger authority to settle with Respondents without Petitioners themselves first knowing the exact dollar amount of any proposed settlement. The exact dollar amount was not known by Petitioners until Respondents' personal attorney Mr. Lozow disclosed that amount to Mr. Fieger 14 months after April 19, 2001. While Petitioners ultimately did settle with the Anderson/Manes/Duran defendants **after** they were told the exact settlement amount, with respect to the Respondents, they repeatedly rebuffed every overture to commit to a settlement by executing the arbitration documents. They always agreed to listen to the proposals, but they always

withheld their consent. The April 19, 2001 letter was a mistake by Mr. Fieger's office. Under settled Colorado law, it was legally ineffective to bind Petitioners. They did not agree to waive their constitutional right to a jury trial.

B. The Essential Terms Of The Purported Settlement Agreement Were Too Indefinite To Permit The Formation Of A Contract.

A settlement agreement is a contract to end judicial proceedings. Recreational Dev. Co. v Am. Const. Co., 749 P.2d 1002 (Colo. App. 1987). As a contract, a settlement agreement is construed using ordinary principles of contract interpretation. Anthony v United States, 987 F.2d 670, 673 (10th Cir. 1993); R.T.C. v Avon Center Holdings, Inc., 832 P.2d 1073, 1075 (Colo. App. 1992). The essential elements of a settlement agreement are "a definitive offer and acceptance, consideration, and parties who have the capacity and authority to agree. . ." Citywide Bank of Denver v Herman, 978 F. Supp 966, 977 (D. Colo. 1997) quoting 15A Am. Jur.2d *Compromises and Settlements* §7, 32-33 (1976). In Colorado, settlements result from "a meeting of the minds and an exchange of sufficient consideration." Van Schaak Holdings, Ltd. v Fulenwider, 798 P.2d 424, 431 (Colo. 1990). To establish the existence of a contract, the parties thereto must agree upon all essential elements. Federal Lumber Co. v Wheeler, 643 P.2d 31 (Colo. 1981). Unless there is a meeting of the minds, there is no contract. Lincoln Liberty Life Ins. Co. v Martinez, 134 Colo. 75, 299 P.2d 507 (Colo. 1956). The existence of a contract is generally a question of fact to be determined by consideration of all facts and circumstances. DiFrancesco v Particle Interconnect Corporation and Nanopierce Technologies, Inc., 39 P.3d 1243, 1247 (Colo. App. 2002); I.M.A., Inc. v Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986).

In DiFrancesco, the Colorado court of appeals reversed an order enforcing a settlement of a patent dispute because the parties did not reach an agreement on several material terms including the scope of the license, plaintiffs' noninterference with licensees, defendants right to personally contact licensees, and the royalty rate for the license. 39 P.3d at 1248. As the court explained:

> "[T]here can be no binding contract if it appears that further negotiations are required to work out important and essential terms. Am. Mining Co. v Hemiod-Kimball Mines Co., 124 Colo. 186, 235 P.2d 804 (1951). See also: Applebaugh v Hoh, 535 P.2d 222 (Colo. App. 1975) (not selected for official publication). Agreements to agree in the future are generally unenforceable because the court cannot force parties to come to an agreement. Griffin v Griffin, 699 P.2d 407 (Colo. 1984)."

The Colorado supreme court has noted that "courts scrutinize closely correspondence and telegrams [because] in many instances such letters are intended merely as preliminary negotiation." Pierce v Marland Oil Co., 86 Colo. 59, 278 P.2d 804, 806 (Colo. 1929). In Pierce, the court noted that the essential question is: "did the parties mean to contract by their correspondence, or were they settling the terms of an agreement into which they formally proposed to enter after all its particulars had been adjusted, and by which alone they intended to be bound?"

In New York Life Ins. Co. v K.N. Energy, Inc., 80 F.3d 405, 410-411 (10th Cir. 1996), the Tenth Circuit affirmed summary judgment in a breach of contract action because the commitment letter was insufficient to constitute a contract under Colorado law. The court said that, at most, the

commitment letter was an unenforceable agreement to agree or a contract subject to conditions precedent which were never fulfilled. The court said that two terms material to the agreement, the interest rate and the maturity date of the note were left open to further negotiations and actions.

Similarly, the Restatement 2d Contracts makes it clear that such preliminary negotiations may not be enforceable where the contract price is indefinite. Section 33(3) states:

> "The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."

The Comment to this sub-section makes the point that where the parties to negotiations for sale manifest an intention not to be bound until the price is fixed or agreed, the parties are merely engaged in preliminary negotiations and the law gives effect to that intention not to be bound. Comment (c). As subsection (e), Indefinite Price states, "Where the parties manifest an intention not to be bound unless the amount of money to be paid by one of them is fixed or agreed and it is not fixed or agreed there is no contract." See also: C.R.S. 4-02-305(4).

The clear Colorado law set forth here should have been applied to the facts of this case. Here, as in New York Life Ins., and as in DiFrancesco, the most that can be said about the effect of the April 19, 2001 letter is that, as to Respondents, there were preliminary negotiations that suggested that there might be a settlement agreement reached in the future if Petitioners were presented with a specific dollar amount to which they could agree. Instead, all that had been exchanged and agreed to (and only by Petitioners'

attorneys, not the Shoels themselves) was a specific formula as to how to divide the aggregate settlement res. Obviously, knowing the formula is not the same as knowing exactly how much Petitioners would receive because the sum ultimately to be received depended on the total funds that were actually ultimately put into the escrow, the number of takers from the settlement res, and most importantly upon Judge Carrigan's analysis that had yet to be done, regarding how much to set aside for non-settling claimants like the Rouse group. The "agreement" was so indefinite on April 19, 2001, that Mr. Wahlberg who was an attorney representing other plaintiffs, not the Respondents, was continuing to provide additional terms to Mr. Raymond the next day in his two April 20, 2001 letters. Mr. Wahlberg's April 23 and 24, 2001 letters to Mr. Fieger also admitted that no one could then state an exact settlement amount. Moreover why, if this "settlement contract" was sufficiently definite to be enforceable, did Respondents continue to make new settlement overtures to Petitioners and wait 15 months to sue to enforce it? Petitioners submit that if Respondents had tried to go into court in April or May 2001 to place the April 19, 2001 "settlement" on the record, they would have been laughed out of court.

Instead, two years later, the district judge decided that Mr. Fieger had somehow magically fully submitted Petitioners to the settlement process by the simple act in March 2001 of proposing that all death claims be evaluated at the Colorado wrongful death statutory maximum of $366,000 (App. 36a). According to the district court, the fact that there were provisions for "detailed procedures and formulas for determining how much Petitioners and other participating plaintiffs, and non-participating claimants, would be awarded in arbitration," was enough to encompass all of the terms essential to a settlement of Petitioners' claims. The court so

concluded despite the fact that the specific "price term" was missing, a fact that Petitioners had repeatedly advised Respondents was a condition precedent to their execution of any settlement papers. The district court's opinion simply ignores the fact that there is a critical difference between Petitioners perhaps being satisfied with the formula for how the fund would be divided, as contrasted with being satisfied, agreeing to and "on board" regarding the final dollar amount they would receive, particularly once they learned that they had been misled about the Rouse group's participation.

Obviously, on the undisputed record presented, an essential term, the actual dollar amount to be paid, was missing. Based on settled law, when essential terms are missing, there is no settlement agreement. The misworded letter from Mr. Fieger's office should be taken for what it was intended to be, nothing more than the acceptance of an agreement to agree and to continue to work toward a final settlement like the one ultimately executed with Anderson, Manes and Duran. But, even that settlement only became contractually enforceable when Petitioners finally learned the exact dollar amount and gave their written assent and then actually executed the August 2001 Arbitration Agreement. By comparison, the lack of any such executed agreement with Respondents compels the conclusion that there was no assent because the offer was too indefinite to satisfy Petitioners' simple condition precedent of knowing exactly what they would receive. The effect of these lower court rulings was to deprive Petitioners of a trial by jury.

C. Any Alleged Settlement By Petitioners Was The Voidable Product Of Mr. Wahlberg's Misrepresentation About The Rouse Group's Participation, And Moreover, Respondents Never Detrimentally Relied Upon The Immediately Rescinded Agreement.

An approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion. Reiss v Hagman, 881 F.2d 890, 892 (10th Cir. 1989). Here, there was simply no rational basis in the evidence for the lower courts to reject Petitioners' claim that the April 19, 2001 letter was a mistake induced by a material misrepresentation of fact by Mr. Wahlberg, to wit, that all plaintiffs were "on board."

At the March 14, 2003 hearing, Petitioners offered evidence that clearly established that Mr. Wahlberg materially misrepresented the status of the settlement discussions with Respondents. When Mr. Raymond and Mr. Wahlberg spoke by phone on April 18, 2001 following Petitioners' attorneys' receipt of Mr. Wahlberg's April 16, 2001 letter which had confusingly referred to both the Anderson/Manes/Duran settlement discussions and discussions with Respondents, Mr. Raymond was clearly led to believe that the Rouse group was now "on board" with Respondents' negotiations as well. This misimpression was later conveyed by Mr. Wahlberg to Mr. Fieger's assistant Ms. Macavey. As soon as Mr. Fieger and Mr. Raymond discovered that the Rouse group was still not participating in Respondents' settlement discussions, they both contacted Mr. Wahlberg. As Mr. Raymond's April 20, 2001 letter put it, "We were shocked that there was a settlement that did not include the Rouse's group" as to Respondents "because the last conversation was that the Shoels were the only ones who weren't on board."

Nonetheless, the lower courts ignored this part of Mr. Raymond's letter and instead focused on his statement that, "We were not shocked that there was a settlement." A reasonable person would conclude that Mr. Raymond was referring to a "settlement" that included the Rouse group. Fairly read, Mr. Raymond's statement means nothing more than that he was not surprised that Respondents had agreed to offer their policy limits and that parties had agreed to a formula. It does not mean that Petitioners had abandoned their demand to know a sum certain for any settlement before they made a final decision.

Restatement, Contracts 2d, §164(2) provides:

> §164 When a Misrepresentation Makes a Contract Voidable
>
> * * *
>
> (2) If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by one who is not a party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient, unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction."

As Comment (e) goes on to explain, a contract is voidable for misrepresentation by a third party so long as the offerors [here the Respondents] have not changed their position in reliance upon the contract.

In this case, there was no detrimental reliance. Moreover, there is simply no rational basis in the evidence for the district court's statement that Petitioners' attorneys could not have reasonably believed that the Rouse group was now

participating in Respondents' discussions. Mr. Wahlberg induced this mistaken belief by his statements that led up to the fax of the April 19, 2001 letter from Mr. Fieger's office. While Mr. Wahlberg's misrepresentation was probably innocent, it was nonetheless a material misrepresentation that induced the April 19, 2001 letter. The district court erred by not voiding the "settlement agreement" once these facts were known.

Further, even if the district court did not find a material misrepresentation, the district court or the Tenth Circuit should have found it inequitable to force a settlement upon Petitioners based on a unilateral mistake. Restatement 2d, Contract § 153 provides:

> "When Mistake of One Party Makes a Contract Voidable
> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
>
> (b) the other party had reason to know of the mistake or his fault caused the mistake."

As the comments and illustrations to this section go on to explain, relief will be granted **where the other party actually knew or had reason to know of the mistake at the time the contract was made.**

The Colorado supreme court has approved of §153 in the context of public bids. In Powder Horn Constructors, Inc. v City of Florence, 754 P.2d 356 (Colo. 1988), the court reversed the forfeiture of a bid bond and remanded for a determination of whether the construction company's bid was made in good faith where the facts established that the city was aware of the possible mistake in the bid and where plaintiff communicated its intention to rescind the bid immediately, prior to any change of position by the city. 754 P.2d 361. As the court noted, the city did not accept the bid until later - - at a time when it had full knowledge of both the mistake and the fact that because of the mistake Powder Horn had withdrawn its bid. Moreover, there was no delay, no surprise, and no justifiable reliance by the city when it elected to accept the bid.

So it is here. Based on Petitioners' consistent, ongoing stance that they would not settle without knowing the exact amount they would receive and based on Mr. Fieger's immediate rescission of the misstated April 19, 2001 letter, it is absolutely clear that Respondents "had reason to know" of the "mistake." Moreover, as they silently acknowledged at the hearing, upon receipt of the miscommunication, they did absolutely nothing to change their position that amounted to detrimental reliance. Instead, they waited 15 months to even officially assert that the April 19, 2001 letter had created an enforceable settlement agreement. Here, as in Powder Horn, there was no delay, no surprise and no justifiable reliance by Respondents when they decided in July 2002 to enforce the April 19, 2001 mistake as a settlement of Petitioners' lawsuit.

Accordingly, on the undisputed facts whether based on Mr. Wahlberg's probably innocent, but nonetheless, material misrepresentation or whether based on Petitioners' counsel's unilateral mistake, there remains no rational basis in the

evidence for the district court's decision to enforce the April 19, 2001 letter against Petitioners as a settlement agreement and to thereby deprive them of their constitutional right to trial by jury.

CONCLUSION

The decision below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The effect of the lower court's decision to enforce the settlement agreement unconstitutionally deprived Petitioners of their Seventh Amendment right to a jury trial. Petitioners request that this Court grant the petition for writ of certiorari to correct the serious injustice which has precluded them from having the wrongful death claim tried on the merits to a jury.

Respectfully submitted,

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Date: November 19, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 03-1295

[Filed August 24, 2004]

MICHAEL SHOELS and VONDA SHOELS, as parents of decedent ISAIAH SHOELS,
Plaintiffs-Appellants,

v.

THOMAS KLEBOLD, SUSAN KLEBOLD, WAYNE HARRIS, and KATHERINE HARRIS,
Defendants-Appellees,

and

JEFFERSON COUNTY SHERIFF JOHN STONE, individually and in his official capacity, FORMER JEFFERSON COUNTY SHERIFF RONALD BECKHAM, individually and in his official capacity, JEFFERSON COUNTY SHERIFF'S DEPARTMENT, NEIL GARDNER, individually, JOHN HICKS, individually, MARK M. MILLER,

individually, T. WILLIAMS, individually, MIKE GUERRA, individually, PHILIP LEBEDA, individually, JOHN or JANE DOES 2 THROUGH 10 (all deputies in the Jefferson County Sheriff's Department), individually, JEFFERSON COUNTY SCHOOL DISTRICT R-1, FRANK DeANGELIS, individually and in his official capacity, HOWARD CORNELL, individually and in his official capacity, PETER HORVATH, individually, WILLIAM BUTTS, individually, GARRETT TALOCCO, individually, JUDY KELLY, individually, TOM TONELLI, individually, TOM JOHNSON, individually, JOHN or JANE DOES 11 THROUGH 30, individually, JAMES ROYCE WASHINGTON, RONALD F. HARTMAN, J.D. TANNER, doing business as Tanner Gun Show, PHILLIP DURAN, MARK MANES, and ROBYN ANDERSON,

Defendants.

ORDER

Before EBEL, ANDERSON, and McCONNELL, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ _____
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Case No. 03-1295

[Filed July 21, 2004]

MICHAEL SHOELS and VONDA SHOELS, as parents of decedent ISAIAH SHOELS, Plaintiffs-Appellants,	)
v.	)
THOMAS KLEBOLD, SUSAN KLEBOLD, WAYNE HARRIS, and KATHERINE HARRIS, Defendants-Appellees,	)
and	)
JEFFERSON COUNTY SHERIFF JOHN STONE, individually and in his official capacity, FORMER JEFFERSON COUNTY SHERIFF RONALD BECKHAM, individually and in his official capacity, JEFFERSON COUNTY SHERIFF'S DEPARTMENT, NEIL GARDNER, individually, JOHN HICKS, individually, MARK M. MILLER, individually, T. WILLIAMS, individually, MIKE GUERRA, individually,	)

PHILIP LEBEDA, individually,)
JOHN or JANE DOES 2 THROUGH 10)
(all deputies in the Jefferson County Sheriff's)
Department), individually, JEFFERSON)
COUNTY SCHOOL DISTRICT R-1,)
FRANK DeANGELIS, individually and)
in his official capacity,)
HOWARD CORNELL, individually and)
in his official capacity,)
PETER HORVATH, individually,)
WILLIAM BUTTS, individually,)
GARRETT TALOCCO, individually,)
JUDY KELLY, individually,)
TOM TONELLI, individually,)
TOM JOHNSON, individually,)
JOHN or JANE DOES 11 THROUGH 30,)
individually, JAMES ROYCE WASHINGTON,)
RONALD F. HARTMAN, J.D. TANNER,)
doing business as Tanner Gun Show,)
PHILLIP DURAN, MARK MANES, and)
ROBYN ANDERSON,)
Defendants.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 00-B-1614)

COUNSEL: Geoffrey Nels Fieger (Victor S. Valenti with him on the briefs), Fieger, Fieger, Kenney & Johnson, P.C., Southfield, Michigan, for Plaintiffs-Appellants.

C. Michael Montgomery (Steven G. Greenlee with him on the brief), Montgomery, Kolodny, Amatuzio & Dusbabek,

L.L.P., Denver, Colorado, for Defendants-Appellees, Wayne Harris and Katherine Harris.

Frank D. Patterson (Gregg E. Kay and Kerri J. Atencio with him on the brief), Patterson, Nuss & Seymour, P.C., Englewood, Colorado, for Defendants-Appellees, Thomas Klebold and Susan Klebold.

Before EBEL, ANDERSON, and McCONNELL, Circuit Judges.

OPINION

McCONNELL, Circuit Judge.

Five years after the tragedy at Columbine High School, we are called to determine whether the district court rightly put to rest a lawsuit between Michael and Vonda Shoels, whose son Isaiah was killed at Columbine, and the parents of the two shooters. Over strenuous objection, the district court found that the Shoels, through counsel, had entered a binding agreement to settle their claims in April of 2001. Because the Shoels have provided us with no reason to think that the district court's factual findings were clearly erroneous, we affirm the order of the district court.

BACKGROUND

In the year 2000, Michael and Vonda Shoels sued a number of defendants for failing to prevent or facilitating the killing of their son. Two groups of defendants are relevant to this appeal: first, the Harrises and Klebolds, parents of the shooters, and second, three associates of the shooters named Mark Manes, Phillip Duran, and Robyn Anderson, who were later added to the lawsuit (collectively referred to as the

"Manes group"). The Shoels' primary legal counsel was Geoffery Fieger, a Michigan attorney who retained the exclusive right to communicate with the Shoels and, for the most part, was the only one authorized to negotiate on their behalf. Mr. Fieger worked with Jack Beam & Associates as local counsel, and especially with Douglas Raymond, an associate at that firm. In the summer of 2000, Mr. Fieger specifically authorized local counsel to offer to settle with the Harrises and Klebolds if they would pay the policy limits of their homeowner's insurance to the Shoels and one other family.

Reluctant to settle with the families of two victims without simultaneously resolving the potential claims of all the other victims and their families, the Klebolds suggested that they might want to involve other potential plaintiffs in the process. Mr. Beam urged them not to do so, and warned in a letter that their offer was "the only attempt which will be made by these families . . . to settle within your clients' policy limits," and that "settlement with Mr. Fieger's clients will substantially reduce the Klebolds' personal exposure by not facing a trial with a lawyer with Mr. Fieger's elan." App. 192-93.

In the following months, a growing number of potential claimants became involved in trying to work out a global settlement. One of the attorneys, Stephen Wahlberg, emerged as the primary spokesman for these plaintiffs. While he was not authorized to act on behalf of any other attorneys' clients, he was the intermediary who would relay communications back and forth between the various defendants and the various plaintiffs. In September of 2000, he demanded that the Klebolds, Harrises, and Mark Manes pay their policy limits in full (an aggregate amount of roughly $2.4 million) to a group of thirteen plaintiffs in return for releasing their claims. Although formally included in this group, the Shoels remained

tentative about actually accepting a settlement until they knew more definitely the amount they could expect to receive.

In November of 2000, the Klebolds, the Harrises, and Mark Manes made a counteroffer. They pointed out that there were still twenty-four potential claimants outside of Mr. Wahlberg's group, whose claims would not be resolved by the proposed settlement. Six of those claimants, represented by Jim Rouse, had refused to join Mr. Wahlberg's coalition despite substantial efforts to include them. In their opinion, any settlement that allowed the Harrises and Klebolds to resolve the claims against them using only insurance proceeds - and thereby to escape "scot-free" with respect to their personal assets - was unacceptable. They wanted the Harrises and Klebolds to pay personally for the victims' losses, at least to some extent, and apparently also demanded a chance to confront the Harrises and Klebolds face to face. The other eighteen had not been represented by counsel up to that point, and it was not known whether they were interested in pursuing their potential legal claims. The defendants acknowledged that it was unlikely that Mr. Rouse's group would settle, but offered to settle with the remaining thirty-one claimants for $1.6 million, assuming that the Wahlberg group could get the other eighteen to agree.

To muster the required consensus, Mr. Wahlberg's group enlisted the help of an organization called the Judicial Arbiter Group, an association of retired judges who provide alternative dispute resolution services. The group agreed to help contact the remaining victims and/or their families; one of its members, Judge Jim Carrigan, agreed to help the various plaintiffs divide the settlement proceeds by serving as an arbiter who would determine the relative value of each claim, based on the claimant's damages and likelihood of success. Eventually, all but four of the eighteen families

agreed to join in the Wahlberg settlement negotiations, and the remaining four seemed unlikely to sue at all. In March 2001, arbitration agreements were sent out to each of the twenty-seven participating families. Because Mr. Raymond, the Shoels' local counsel, had not received the Shoels' copy in early April, Mr. Wahlberg sent a second copy of the arbitration agreement on April 13, stating that everyone else had signed and requesting the Shoels' signature.

Meanwhile, the parties continued to negotiate which plaintiffs would settle with each group of defendants, how much of their insurance proceeds each group of defendants would pay to settle the plaintiffs' claims, and how much they would be allowed to set aside to defend against any other claims not covered by the settlement. On March 14, Mr. Wahlberg faxed to the Shoels' counsel a letter from Mr. Rouse confirming that his clients would not settle with the Klebolds and Harrises. Then, on April 9, Mr. Wahlberg advised the Shoels' counsel that Mr. Rouse thought his clients would participate in arbitration of their claims against Defendants Manes and Duran. Mr. Wahlberg also speculated that some of Mr. Rouse's clients might have second thoughts about the Klebolds and Harrises as well.

A settlement conference was held on April 10, 2001, the results of which were sent by fax to the parties (including Jack Beam, local counsel for the Shoels) in a letter dated April 16. That letter made it clear that the Rouse plaintiffs were not participating in the settlement with the Klebolds and Harrises, but suggested that they would participate in the other settlements. In the Klebold/Harris negotiations, the parties ultimately agreed that instead of negotiating the amount to be reserved for the Rouse group and other nonparticipating claimants, they would let the arbiter determine it. According to the final proposal set forth in the letter, the Harrises and

Klebolds would put 98% of their insurance policy limits ($1,368,000) into escrow, leaving the other 2% to cover possible zone-of-danger claims. Then, the arbiter would determine what share of the escrowed funds each potential claimant (including the nonsettling claimants) should receive. The amounts attributable to nonsettling plaintiffs would be held in reserve to cover any successful claims, and any unused portion of those funds would be distributed to the settling plaintiffs after the statute of limitations expired.

The proposed settlements with Defendants Manes, Anderson, and Duran had a similar structure, with one exception: those defendants refused to pay their insurance proceeds unless everyone,[1] including the Rouse group, agreed to release their claims. Furthermore, Defendants Manes and Duran were likely judgement-proof, and Anderson was threatening to file for bankruptcy if a unanimous settlement was not reached; this made proceeding to trial considerably less attractive. According to the April 16 letter, Mr. Manes had agreed to deposit $720,000 of insurance proceeds immediately and hold the remaining $80,000 in reserve until the statute of limitations ran. Mr. Duran had "preliminarily" agreed to deposit $250,000 of his insurance money so long as everyone participated, and Ms. Anderson had $300,000 of insurance proceeds available for settlement, though her settlement proposal was not yet finalized.

By April 18, the six families represented by Jim Rouse had definitely agreed to settle with the Manes group. This left only the Shoels who had not committed to settle with those

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[1] This apparently did not include the four potential claimants who had refused to participate in any settlement negotiations whatsoever.

defendants. Mr. Wahlberg called Mr. Raymond, explained that "everyone else was on board," including the Rouse group, and said that it was time for the Shoels to make a choice. In Mr. Wahlberg's recollection, it was clear that he was speaking about the negotiations with Manes, Anderson, and Duran. Two days after the April 18 conversation, however, Mr. Raymond claimed that Mr. Wahlberg falsely led him to believe that the Rouse group was settling with the Harrises and Klebolds as well. In any event, Mr. Raymond said that he would have to speak with Mr. Fieger and his clients. They were not able to reach Mr. Fieger that day, but the next morning (April 19) Mr. Wahlberg had another conversation with Mr. Raymond and someone at Mr. Fieger's office, again stressing that the Shoels needed to decide what they were going to do and give him something in writing. Later that same morning, Mr. Fieger's office sent a letter to Mr. Wahlberg, apparently signed by Mr. Fieger,[2] which read as follows:

> This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson, and Duran.

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[2] Mr. Fieger testified at the hearing that it was actually a secretary who drafted, signed, and sent the letter at his instruction, and that he had never meant to do more than express the Shoels' continued willingness to be part of the negotiations without committing to be bound by the arbitration. As far as we can tell from the record, he did not come forward with this story until more than a year after the April 19 letter was sent, even though he disputed the existence of a settlement agreement almost immediately. Furthermore, on cross-examination, Mr. Fieger expressed some uncertainty about whether he had signed the letter. The district court found Mr. Fieger's claim that the letter was "misworded" to be unbelievable, Op. 9, and we will not second-guess its credibility determinations.

App. 153. Mr. Wahlberg immediately faxed that letter on to counsel for the Klebolds and Harrises, together with a general acceptance letter on behalf of all the claimants.

Within twenty-four hours, this apparently successful conclusion to the settlement negotiations began to unravel. When the Shoels' attorneys realized that the Rouse group was not settling with the Klebolds and Harrises, they immediately repudiated the agreement. Mr. Raymond sent a letter saying that they were "shocked" that the Rouse group was not settling with the Klebolds and Harrises, which he considered "contrary to the representation that 'everybody is on board except the Shoels.'" He redescribed Mr. Fieger's letter as saying that the Shoels had "tentatively approved settlement," and insisted that the Shoels would not settle until they got "the full deal in writing." App. 202.

That same day, Mr. Wahlberg wrote back, expressing dismay that Mr. Raymond was "shocked" and reviewing the terms of the settlement. App. 582. Mr. Raymond responded, saying, "I want to make it clear to you that we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris." App. 180. Over the next several days, Mr. Fieger requested more information about the precise amount that the Shoels could expect to receive. Mr. Wahlberg explained the agreed-on process and that until the arbiter had ruled, it was impossible to put a precise value on the Shoels' claim under the settlement. However, he eventually estimated that the Shoels' claim might be valued at somewhere between $28,000 and $84,000. Mr. Fieger responded that his clients would "*never* settle a claim with the Harrises and Klebolds wherein they stand to receive $28,000-84,000." App. 215

(emphasis in original).[3] At one point in the correspondence, Mr. Wahlberg wrote that the Shoels would not be bound by the April 19 letter because they had not yet signed any agreements. However, after further discussions with counsel for the Harrises (who were less forgiving), he wrote back, saying that he had been mistaken and that the Shoels, like all the other parties, were bound by the settlement agreement reached on April 19.

The official claim releases were not signed until that August, after the arbitration was complete (but before its results were disclosed). The Shoels signed their final releases against Manes, Anderson, and Duran, but not against the Klebolds and Harrises. Although the Harrises and Klebolds maintained their position that the Shoels were bound by their April 19 acceptance, they did make further settlement overtures to the Shoels, in hopes they could persuade the Shoels not to contest the validity of the settlement agreement. When those negotiations broke down, the Shoels moved to have their case sent back to state court (where Mr. Fieger was confident that he could get the case to a jury), and the Klebolds and Harrises brought motions to enforce the settlement agreement. After an evidentiary hearing in March of 2003, the district court determined that the Shoels had accepted an offer to settle on April 19, and that they were bound by their contract.

DISCUSSION

"A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the

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[3] Apparently, Mr. Fieger lost this focus on the bottom line sometime between the Spring of 2001 and oral argument, where he insisted that the dispute was "not about the money."

litigation is pending before it." *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993). We review the district court's decision to enforce such an agreement for an abuse of discretion. *Id.* at 1495. An abuse of discretion occurs when the district court "based its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Wang v. Hsu*, 919 F.2d 130, 130 (10th Cir. 1990). Issues involving the formation and construction of a purported settlement agreement are resolved by applying state contract law. *United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000).

In this appeal, Appellants present three primary arguments for overturning the district court's enforcement of the settlement agreement. First, they argue that Mr. Fieger did not have his clients' express authority to settle the claims, making his April 19 letter *ultra vires* and hence invalid. Second, they argue that the terms of the settlement were too vague to constitute a binding agreement, and were at most a preliminary agreement to agree. Third, they argue that their mistake about the Rouse group's participation, which they claim was caused by Mr. Wahlberg's misrepresentation, gave them the option of voiding the contract, which they immediately did. We consider each contention in turn.

I

Relying on the settled Colorado rule that an attorney cannot settle a claim unless the client expressly authorizes him to do so, the Shoels first argue that Mr. Fieger had no authority to settle their claims on their behalf. *See Cross v. Dist. Court*, 643 P.2d 39, 41 (Colo. 1982) (en banc) ("[A]s we have stated on numerous occasions, an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client.") In

response, Appellees point out that Mr. Fieger himself testified that he had exclusive authority to negotiate on behalf of the Shoels, and that in June of 2000 he authorized local counsel to "make a settlement" offer. Of course, that evidence is not dispositive; an attorney may be authorized to negotiate even if the client retains sole authority to sign off on the final agreement, and the fact that an attorney has his client's consent to authorize an offer in one case does not prove that he has it to accept a very different offer several months later.

More helpful is Appellee's citation to *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966), where this Court held that there is a presumption that an attorney has express authority to settle unless there is evidence to the contrary in the record. When they first disputed the settlement, counsel for the Shoels never claimed that their clients had not signed off on the acceptance or that Mr. Fieger had been acting contrary to his clients' wishes. Appellants now cite evidence that, at earlier stages of negotiations, they had refused to settle without knowing in advance the ultimate dollar value they would receive. Mr. Fieger strains to read this as evidence of a limitation on his authority to settle, but we are not convinced. Parties often relax their supposedly non-negotiable demands over the course of negotiations, and the mere fact that a party does so through counsel does not suggest that counsel has exceeded the scope of his express authority. Of course, counsel for the Shoels did renew their demand for a precise figure after April 19, but only once they learned that the Rouse group was not participating. Appellants' position seems to have been that, despite their demand for a fixed settlement amount, if all the other attorneys agreed to the arbitration procedure, they would not be "the sole laggards" or "obstructionists." App. 481. Thus, even if Mr. Fieger's long refusal to settle except in return for a fixed dollar amount were probative of a corresponding

limitation on his authority, his apparent willingness to settle so long as the Rouse group settled - even before the arbiter had determined what the Shoels would receive - would be just as probative of his authority to do so.

Evidence about the Shoels' general negotiating position provides at best indirect evidence for whether the Shoels really did change course and agree to the arbitration process by April 19. The most direct evidence is the text of the April 19 letter itself: "This letter shall serve to confirm that Mr. and Mrs. Shoels *have approved* settlement with Defendants Klebold, Harris, Manes, Anderson and Duran." App. 153 (emphasis added). If one takes that sentence at face value, it states that the Shoels either approved the agreement themselves or authorized Mr. Fieger to do so. Admittedly, the record also contains a few stray remarks that could possibly be read to indicate a lack of authority; for instance, Mr. Fieger did testify that the Shoels "had already indicated they refused to sign the [arbitration] agreement" in the days leading up to April 19, suggesting that they were still refusing to participate when the acceptance letter was sent. App. 482. But that testimony was all in support of Mr. Fieger's claim that his letter was "misworded," and that in fact neither he nor the Shoels meant to commit to settlement on April 19. The district court specifically discredited that claim. Thus, the facts as found by the district court establish that Mr. Fieger, at least, intended to settle. Op. 9. In light of the language of Mr. Fieger's letter and the presumption that an attorney does not act without authorization, the most natural conclusion is that the Shoels also intended to settle. Indeed, there was no hint of a division between the Shoels and their counsel in the proceedings below. Thus, there was a sufficient basis in the record for the district court's finding that the Shoels, through counsel, accepted the Harris/Klebold offer.

But even if we were not convinced of this, it would be improper to reverse the district court on this ground, because the Shoels never properly presented their lack-of-authority claim to that court. When pressed at oral argument, Mr. Fieger stated that he did raise the claim, and cited several pages of the transcript where he testified that the Shoels consistently refused to settle without knowing the dollar amount they would receive. But even though Mr. Fieger's testimony about the Shoels' refusal to consent could conceivably have provided a factual basis for the legal claim he now raises, that is not enough; a party must also present the legal basis of the claim to the district court clearly and explicitly. *See N. Natural Gas Co. v. Hegler*, 818 F.2d 730, 734 (10th Cir. 1987) (refusing to consider a legal claim suggested by the evidence but not argued below); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) (stating that "vague, arguable references to [a] point in the district court proceedings do not . . . preserve the issue on appeal") (quoting *Monarch Life Ins. Co. v. Elam*, 286 U.S. App. D.C. 396, 918 F.2d 201, 203 (D.C. Cir. 1990) (brackets and ellipses in original)). Nowhere in the briefing or argument did Mr. Fieger argue that he lacked authority or cite any cases raising the issue of an attorney's authority to settle on behalf of a client. His theory was not that he had settled the case without the Shoels' permission; rather, his theory was that neither he nor the Shoels settled or intended to settle. The general rule in this circuit is that "a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory." *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 999 (10th Cir. 2002) (quoting *Lyons*, 994 F.2d at 721).

Of course, we do have discretion to make exceptions in extraordinary circumstances, and as Appellants note, we are more willing to exercise that discretion when the newly raised

issue is primarily a legal one. *See, e.g.*, *Petrini v. Howard*, 918 F.2d 1482, 1483 n.4 (10th Cir. 1990) ("A federal appellate court is justified in reversing a judgment on the basis of issues not raised below when, as here, the issues involved are questions of law, the proper resolution of which [is] beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice."). But because the question of Mr. Fieger's authority is essentially factual, it would be inappropriate to make an exception in this case. Had this issue been properly raised below, both sides could have presented evidence (including, perhaps, the crucial testimony of Mr. and Mrs. Shoels) about what the Shoels knew and what they authorized, rather than focusing on Mr. Fieger's intent to settle (which is irrelevant if he lacked authority to settle in the first place). When a fact question is not squarely presented to the finder of fact and the adverse party, it would be unfair to allow an appellant to prevail simply because the evidence accidentally adduced on that question tips in the appellant's favor. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868 (1976) (explaining that appellate courts should generally decline to reach newly argued issues so that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence"), 49 L. Ed. 2d 826. That is doubly true when an appellant wishes to argue that the acts of an attorney are not imputable to his client, as they are generally presumed to be.

II

Next, the Shoels argue that the April 19 letter could not have created a binding contract because the terms of the proposed settlement were still too vague. They claim that at most, their agreement was a nonbinding agreement in principle, subject to further negotiations. In Colorado, whether negotiations are sufficiently definite and final to

create a binding contract is to be decided by the finder of fact. *I.M.A., Inc. v. Rocky Mountain Airways, Inc.*, 713 P.2d 882, 887 (Colo. 1986) (en banc). The district court determined that there was a binding contract, and the record supports its finding. Mr. Wahlberg's April 16 letter, as well as his subsequent telephone conversations with the Shoels' counsel, laid out the terms of the Klebolds' and Harrises' offer in detail, explaining exactly how much they were offering, how a portion of that amount would be held in reserve to cover the Rouse group's claims, and how the remainder would be distributed among the settling plaintiffs. Mr. Fieger's reply letter was no less definite, stating in categorical terms that the Shoels had approved settlement. It contained no language suggesting that their approval was provisional or "tentative" (as Mr. Raymond tried to describe it the next day). The context of that letter also suggests that it was meant to be binding. The Shoels had been "participating" without committing to the arbitration process for quite some time. As the district court noted, the question on April 19 was whether they would finally commit so that the settlement, as set forth in the April 16 letter, could be finalized. And if the content and context of the letter were not enough to show that the parties meant to enter a binding agreement, we have local counsel's own insistence, just one day after the April 19 letter, that the Shoels' attorneys "were not surprised that there was a settlement." App. 180.

Despite this evidence, Appellants contend that the district court's finding was clear error. They stress the fact that at the time of their alleged acceptance, there was no way they could know how much they would get out of the settlement. This, they claim, makes their case analogous to Colorado cases in which an agreement was held unenforceable. *See, e.g.*, *Griffin v. Griffin*, 699 P.2d 407 (Colo. 1984) (en banc); *Difrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1250 (Colo. Ct.

App. 2001). But these cases involved very different facts. In *Griffin*, a husband and wife had agreed as part of a divorce settlement that they would reach a joint agreement about where their daughter would go to school. When they were unable to reach such an agreement, the mother (who had custody of the child and thus the legal right to choose her school) chose a school over the father's objection. The Colorado Supreme Court held that because the parties' separation agreement "made no provision for the resolution of disagreement concerning the selection of schools," and because the court could not force the parents to agree on a school, it could not enforce the agreement. *Griffin*, 699 P.2d at 409. Similarly, *Difrancesco* involved a license agreement that not only left essential terms like the royalty rate and license scope unspecified, but also failed to specify any method by which these terms could later be determined. 39 P.3d at 1250. The lack of such a method brought those cases within the firmly settled Colorado rule that "[i]f essentials are unsettled, *and no method of settlement is agreed upon*, there is no contract." *Greater Serv. Homebuilders' Inv. Ass'n v. Albright*, 88 Colo. 146, 293 P. 345, 348 (Colo. 1930) (en banc) (emphasis added).

In stark contrast to these cases, the settlement agreement set forth in the April 16 letter (which is what the plaintiffs accepted on April 19) provided a method for fixing a definite value for the Shoels' claims: a neutral arbiter, Judge Carrigan, would determine their value. In such circumstances, it is irrelevant that the value of the claims was difficult to predict in advance; otherwise, every futures contract would be void in Colorado. Once Appellants knew how much money the Klebolds and Harrises were offering to make available, and that those funds would be distributed according to the relative value of each plaintiff's claims as determined by Judge

Carrigan, the arrangement was sufficiently specific to constitute an enforceable contract.

Appellants can also be understood to raise a closely related, but conceptually separable, argument. It is that even if the terms were specific enough to be enforceable, still Appellants' correspondence was meant merely to state tentative approval, not final agreement. Under Colorado law, an acceptance conditioned on reaching a later, more detailed agreement is not binding. *Difrancesco*, 39 P.3d at 1248. Moreover, correspondence during the course of negotiations is often best construed as being conditioned in this way. *Pierce v. Marland Oil Co.* , 86 Colo. 59, 278 P. 804, 806 (Colo. 1929) (in dep't). However, though some evidence in the record supports this interpretation of the April 19 acceptance, it is insufficient to disturb the district court's factual finding.

First, Appellants note that the April 19 letter purported to approve settlement with Robyn Anderson, and since it is undisputed that she had not yet offered a particular amount in settlement, they argue that the April 19 "approval" of settlement with her could not have been meant as a binding acceptance. They then infer that the letter's approval could not have been meant as a binding acceptance of the other defendants' offers, either. That is one possible interpretation of the letter. Another possibility is that Mr. Fieger's April 19 reference to Robyn Anderson was a simple mistake and was therefore irrelevant to the effect of the letter with respect to the valid offers. At the time, Mr. Wahlberg interpreted the approval letter in yet a third way: in his view, the letter did not operate directly as an acceptance of the various settlement offers; rather, by "approv[ing] settlement," it gave Mr. Wahlberg authorization to settle on behalf of the Shoels. In the aftermath of Mr. Fieger's disavowal of his April 19 letter

with respect to the Klebolds and Harrises, Mr. Wahlberg reaffirmed his understanding that Mr. Fieger's letter had given him authority to settle the Shoels' claims against Anderson, Duran, and Manes, and Mr. Fieger's subsequent correspondence appeared to concede that point. If Mr. Wahlberg's interpretation was correct, it would not matter that Anderson's claims were not settled for another week or so. On that interpretation, the April 19 letter gave Mr. Wahlberg authority to settle the various claims; he exercised that authority immediately with respect to the Klebolds and Harrises but only later with respect to Anderson. Thus, even if we reject the district court's simpler view that the April 19 letter was an acceptance, we still find ample record support for its ultimate factual conclusion that a binding agreement was formed that day.

Second, Appellants rely on the fact that the Shoels never released their claims by signing the official arbitration agreement itself. Appellants suggest that signing the release form was a condition precedent to the existence of a valid agreement. In part, this contention seems to be based on a conflation of conditions precedent to the *agreement* and conditions precedent to the Klebolds' and Harrises' *performance*. While it is true that no funds were to be disbursed until the releases were signed, it does not follow that no contract existed until that time. Appellants also rely on language from section IV(B) of the Judicial Arbiter Group's arbitration agreement, which states that "[b]y signing this Agreement . . . the Claimant is agreeing to be bound by the distribution as awarded by the Arbiter." App. 198. They claim that this language makes signing a necessary precondition to being bound. But while it does appear that the agreement contemplated acceptance by signing, the quoted language does not imply that signing the agreement was the *only* way to accept. Its true effect is to set forth one of the

consequences of entering the agreement (namely, becoming bound by the arbitration), not to limit the means by which the agreement might be entered.

Finally, there is the text of the claimants' joint acceptance letter itself. Some of its language does seem provisional:

> Further, the statute of limitations shall be tolled for 30 days from April 20 for anyone participating in the proceedings before Judge Carrigan so that we *may prepare a mutually acceptable settlement agreement.*

App. 159 (emphasis added). This language, while relevant, is not dispositive. While the letter clearly contemplates working out a more detailed agreement, nowhere does it state that the existence of a binding contract is conditioned on successfully completing that process. "'[T]he mere intention to reduce an oral or informal agreement to writing, or to a more formal writing, is not of itself sufficient to show that the parties intended that until such formal writing was executed the parol or informal contract should be without binding force.'" *Rocky Mountain Airways* , 713 P.2d at 888, *quoting Coulter v. Anderson*, 144 Colo. 402, 357 P.2d 76, 80 (Colo. 1960) (in dep't). It may be possible to interpret Mr. Wahlberg's language as saying that there was no binding agreement on April 19, and if such an agreement were not formulated within thirty days, the plaintiffs would remain free to bring suit. But it is also possible that the plaintiffs did consider themselves bound, but required the statute of limitations to be tolled so that they would still be able to bring suit in the event that the defendants breached the agreement to deposit their funds in escrow. *See Goltl v. Cummings*, 152 Colo. 57, 380 P.2d 556, 558-59 (Colo. 1963) (in dep't) (finding that a settlement agreement existed in similar circumstances). Given the non-tentative beginning of Mr. Wahlberg's letter ("The purpose of

this letter is to accept the settlement proposal . . . ."), on balance it, too, supports the district court's conclusion. And whatever ambiguities may be read into the text now, the district court rightly resolved those ambiguities in light of Mr. Raymond's contemporaneous admission that the parties understood the April 19 settlement to be final. Op. 9; *see* App. 180. Thus, whether Mr. Fieger's letter was itself meant as an acceptance, or whether it was meant to authorize Mr. Wahlberg to settle on behalf of the Shoels, the district court's determination that there was a binding acceptance has ample record support.

Appellants cite in their favor *New York Life Ins. Co. v. K N Energy, Inc.*, 80 F.3d 405 (10th Cir. 1996), in which this Court applied Colorado law to hold a note purchase agreement unenforceable. However, the purported agreement in that case was marked by its use of the conditional tense to describe what "would be" the case if the deal were consummated, and unlike Mr. Wahlberg's letter, it specifically stated that the deal would not be consummated until the parties reached "final agreement upon terms, conditions, covenants and other provisions satisfactory to Prudential." *Id.* at 411. Those facts alone suffice to distinguish *K N Energy* . In addition, *K N Energy* is of limited relevance here, because it did not squarely decide whether a contract existed. Instead, because several conditions precedent to the actual note purchase had not been fulfilled, the panel held that the purported agreement was *either* "an [unenforceable] agreement to agree *or* a contract subject to conditions precedent which were never fulfilled." *Id.* (emphasis added). The Shoels have not shown that the Harrises and Klebolds have failed to perform any act on which the Shoels' obligation to release their claims was conditioned. Rather, the Harrises and Klebolds have deposited their funds as required, and now demand that the Shoels fulfill their part of the bargain.

III

Appellants' final argument is that they should not be held to the contract because their acceptance was predicated on either a mistake or a misrepresentation. In particular, they assert that in the discussions and correspondence immediately prior to Mr. Fieger's acceptance, Mr. Wahlberg told local counsel that "everybody is on board except the Shoels," App. 202, 217, and "everyone else has signed the agreement," App. 194, falsely leading the Shoels and their counsel to believe that the Rouse plaintiffs had reconsidered their refusal to settle with the Klebolds and Harrises. This is not a newly argued objection to the alleged settlement. As we have already noted, just one day after Mr. Fieger's acceptance, Mr. Raymond wrote to Mr. Wahlberg: "[W]e were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris." App. 180.

The district court found that because it had been well-established since at least March of 2001 that the Rouse group was refusing to settle with the Klebolds and Harrises, Mr. Wahlberg's statements that "everyone else" had signed the agreement could not reasonably be interpreted to mean that the Rouse plaintiffs had changed their minds. Rather, the only reasonable interpretation was that "all of the claimants who previously had indicated a willingness to participate in arbitration had signed the agreement." Op. 10. Thus, the Court concluded that "the Shoels cannot reasonably claim that they accepted the terms of the arbitration agreement based on the erroneous assumption that the Rouse group was also participating." Op. 10-11.

The ultimate question here, therefore, is whether their counsel's unreasonable misunderstanding of Mr. Wahlberg's statements allows the Shoels to avoid their agreement. Because there is no hint in the record that the Klebolds and Harrises shared Appellants' mistake, that question seems easily resolved by the venerable principle that a unilateral mistake of one party to an agreement is not ground for rescission. *Royal v. Colorado State Personnel Bd.*, 690 P.2d 253, 255 (Colo. Ct. App. 1984) ("What Royal may have understood or contemplated is not relevant. A unilateral mistake or mistake of law, if any, is not a ground for setting aside an agreement."); *In re Marriage of Manzo* , 659 P.2d 669, 672 (Colo. 1983) (en banc) ("[T]raditionally a contract may not be rescinded because one party has made a unilateral mistake as to value unless the other party knew or had reason to know of the error."); *Kuper v. Scroggins*, 127 Colo. 416, 257 P.2d 412, 413 (Colo. 1953) (en banc) ("In order to avoid a contract on the ground of mistake, it must be a mutual mistake."). The Shoels, however, propound three reasons why that principle does not dispose of the case. First, they rely on an equally hoary principle of the law of contracts: that there must be a meeting of the minds on all material points before a contract exists. Second, they argue that the rule against granting rescission based on unilateral mistakes is not as absolute as it is sometimes expressed, and the equities favor setting aside the agreement in their case. Third, they note that courts have traditionally applied more lenient standards when one party's mistake is the result of misrepresentation or fraud, and at least the former is alleged here. For the reasons explained below, however, none of these doctrinal wrinkles persuades us that the Colorado Supreme Court would excuse the Shoels' unilateral mistake in this case.

A

Although one party's mistake about the facts relevant to an agreement is not normally grounds for rescission, the same is not true if the "mistake" goes to a material term of the agreement itself. When the language of a contract contains a latent ambiguity and one of the parties is in fact assenting to something different from what the other party agrees to, the upshot of that "mistake" is that there was never a meeting of the minds as to a material term of the contract, and consequently there was never any contract at all. The textbook example of this principle is *Raffles v. Wichelhaus* 159 Eng. Rep. 375 (Ex. 1864), where the parties agreed to the sale of goods aboard a ship called *Peerless*, but were in fact referring to two different ships by that name.

That principle is inapplicable here. The Shoels' lawyers' mistake regarding whether the Rouse group was participating in the settlement at most affected their assessment of the value of their claim or the desirability of entering the settlement. It did not create any ambiguity regarding the terms or substance of the settlement agreement. Under that settlement, the Shoels agreed to release their claims in return for the Klebolds contributing $1,568,000 into a fund that would be divided up in arbitration. The rights and obligations on both sides were the same, whether or not the Rouse group was participating. We therefore reject Appellants' contention that there was no meeting of the minds because of their misunderstanding about the Rouse group.

B

Appellants argue that even if their mistake was unilateral, equity nevertheless favors voiding the contract because the Harrises and Klebolds did not rely on their acceptance before

it was revoked. They cite in their favor *Powder Horn Constructors, Inc. v. City of Florence*, 754 P.2d 356 (Colo. 1988) (en banc). In that case, a contractor's bid on a city construction project erroneously omitted certain expenses and thus was substantially lower than the other bids. Before the city had accepted any of the bids, the contractor noticed the mistake, informed the city, and submitted a corrected bid. Thereafter, the city accepted the original bid. Noting that "[n]o contract for construction of the project was ever executed by the parties, and there was no delay, no surprise, and no justifiable reliance by the City," the Colorado Supreme Court held that the contractor was entitled to withdraw its bid, even though such bids are generally irrevocable. *Powder Horn*, 754 P.2d at 361. Furthermore, the court refused to require a showing that the contractor had not been negligent, holding that material clerical errors (as opposed to errors in judgment) justify withdrawing a bid so long as the bid was made in good faith and the public authority did not rely on the bid to its detriment. *Id.* at 363.

However, the *Powder Horn* court refused to rely solely on the absence of detrimental reliance by the city. The court noted no fewer than five times that its holding extended only to cases in which the bid was withdrawn prior to formation of a contract. *See id.* at 359, 360, 361, 363, 364. It also relied on the fact that the city knew about the mistake prior to accepting the erroneous bid. *See id.* at 363-64. In the Shoels' case, by contrast, the unilateral mistake was by the party who accepted the contract, and so the attempted withdrawal did not occur until after a contract had been formed.

This distinction is rooted in the idea that parties can make promises to each other that are binding well in advance of performance or detrimental reliance. The moment that each party has given up some consideration in return for the other

party's performance, each becomes entitled to the bargained-for performance, and if the other party declares a moment later that it will not perform, the measure of damages will be relative to the parties' expectations of full performance, not their reliance damages. As the Colorado Supreme Court noted in *Powder Horn*, one of the "basic policies underlying the enforcement of contracts" is the protection of those legitimate expectations. *Id.* at 364.

In the public bid context in which *Powder Horn* was decided, bids are irrevocable upon opening in order to "protect the integrity of the bidding process," *id.* at 360, not to protect bargained-for expectations. For in the typical case, a city has not given up anything in exchange for the lowest bidder's performance when it first opens the bids. It remains free to select another contractor or to reject all of the bids and cancel the project. Outside of the bidding context, general principles of contract law preserve symmetry between the offeror and offeree by making the offeror just as free to withdraw the offer as the offeree is to reject it. Thus, it was quite reasonable for the Colorado Supreme Court to hold that equity favored the mistaken offeror over the city's desire to reap a "windfall profit" for which it had given up nothing. *Id.* at 364. This case, though, involves an attempt to revoke an acceptance, not an offer. That difference is significant because unlike the city in *Powder Horn*, the Klebolds and Harrises lost their freedom to renegotiate the moment the Shoels made their "mistake" and accepted the settlement. Thus, although it is true that the Klebolds and Harrises had not relied on the contract before the Shoels' counsel repudiated it, Mr. Fieger's acceptance letter materially changed their position by committing them to stand by their offer. Having committed to pay almost $1.6 million to settle all of the claims against them, including the Shoels' claims, the Klebolds and Harrises were entitled to the release of those claims.

Appellants also rely on the Second Restatement of Contracts, which does allow unilateral mistake to void a contract under certain circumstances. Even the Restatement, though, does not allow relief when doing so would frustrate the legitimate contract-based expectations of innocent parties. *Powder Horn*, 754 P.2d at 364 n.7. Rather, it allows relief only if the mistakenly entered contract was unconscionable or the defendant knew or had reason to know of the mistake, thus casting doubt on the legitimacy of the defendant's expectations. *Restatement (Second) of Contracts* §153; *Powder Horn*, 754 P.2d at 364 (noting that "equity will not allow a party to knowingly take advantage of a mistake of another").

If the Klebolds and Harrises, like the sharp-dealing city in *Powder Horn*, had known of Appellants' mistake, we would have to decide how the Colorado Supreme Court would apply *Powder Horn*'s analysis in the context of a fully-formed contract. But the Klebolds and Harrises, who were not party to the discussions between Mr. Wahlberg and counsel for the Shoels, had no way of knowing about the miscommunication about the Rouse group's participation when the contract was formed. Rather, they were just the kind of innocently contracting parties whose protection the Colorado Supreme Court considers to be of fundamental importance to the law of contracts. *See Powder Horn*, 754 P.2d at 364. We therefore reject the argument that Appellants should have been permitted to withdraw from the settlement agreement because of their unilateral mistake.

C

Finally, Appellants argue that they accepted the settlement not merely because of their own confusion, but rather because Mr. Wahlberg affirmatively (though, they concede, innocently) misrepresented the status of the Rouse group.

Under Colorado law, rescission based on misrepresentation is both easier and harder to obtain than rescission based on unilateral mistake. On the one hand, Colorado law allows rescission of an acceptance based on a material misrepresentation even after the contract is formed, and even if the other party did not knowingly or unconscionably take advantage of the resulting misapprehension. *See Wall v. Foster Petroleum Corp.*, 791 P.2d 1148, 1150 (Colo. Ct. App. 1989); *Bassford v. Cook*, 152 Colo. 136, 380 P.2d 907, 910 (Colo. 1963) (in dep't); *Wheeler v. Dunn*, 13 Colo. 428, 22 P. 827, 833 (Colo. 1889) (setting forth the requirements for equitable rescission based on misrepresentation); *see also Restatement (Second) of Contracts* §164(2) . But on the other hand, while *Powder Horn* allowed the withdrawal of a bid even based on negligent mistakes so long as they were made in good faith, 754 P.2d at 363, it is "well settled" that plaintiffs must show that their reliance on a material misrepresentation was justified. *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1383 (Colo. 1994) (en banc). Thus, the contract is voidable on this ground only if Mr. Wahlberg's statement was a material misrepresentation on which the Shoels were justified in relying.

Appellants fail to establish that it was. First, it is far from clear - in light of the district court's factual findings - that Mr. Wahlberg's statement that "everyone is on board," App. 202, was a misrepresentation at all. In context, according to the district court, this statement could only be reasonably interpreted to refer to those parties engaged in negotiations, which (with respect to the Klebolds and Harrises) did not include the Rouse group. Mr. Wahlberg was simply informing Appellants that they were the last claimants whose assent was necessary to finalize the various settlements.

Even assuming the statement could be regarded as a misrepresentation, Appellants make no showing that it was material. Whether or not the Rouse plaintiffs participated, the arbiter would determine the Shoels' portion of the insurance proceeds by calculating the ratio of their damages to the total of all damages (including the Rouse group's damages). Either way, the Shoels' likely share of the proceeds would have remained roughly the same, and might even have been larger if the Rouse group did not participate (since the agreement was that funds set aside but not ultimately used to defend particular claims would eventually be distributed among the settling claimants).

Nor have Appellants established that they were justified in relying on Mr. Wahlberg's misrepresentation (if it can be called that). Under Colorado law, reliance on a misrepresentation is unjustified if the context obviously calls its accuracy into question or suggests that further investigation is necessary. *See, e.g.*, *Mortimer*, 866 P.2d at 1381-82 (plaintiffs were not justified in relying on a verbal misrepresentation about the location of a proposed highway; because a prominently displayed map showed the correct location, plaintiffs had a duty to inquire further); *Bassford*, 380 P.2d at 909-10 (buyers were not justified in relying on arguably inaccurate explanations for cracks in the walls of a house when the seller had given them the contact information of the engineer who could explain the problem in more detail). Mr. Wahlberg suggested that "everyone else" had agreed to settle on two different occasions: both in an April 13 letter, and then again in the April 18 telephone conversation. App. 194, 202, 217. But in the interim, his April 16 letter setting forth the final contours of the settlement painstakingly explained that the Klebolds and Harrises would be withholding from the settlement proceeds the portion of funds attributable to the Rouse group and other nonsettling

claimants. App. 606. The April 16 letter, together with the Rouse group's long refusal to settle with the Harrises and Klebolds, supports the district court's finding that it was unreasonable for Appellants to rely on Mr. Wahlberg's statement to conclude that the Rouse group had changed its position. Even were we to disagree with that finding, under Colorado law we would be bound to defer to the district court's assessment on this point. See *Mortimer*, 866 P.2d at 1382. Misunderstanding, not misrepresentation, was the basis for Appellants' acceptance, and so they cannot evade the normal limitations on relief from the consequences of their mistake.

CONCLUSION

For the reasons discussed above, the decision of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 00-B-1614
(Consolidated with 01-B-718 and 01-B-969) (PAC)

[Filed June 23, 2003]

MICHAEL SHOELS AND VONDA SHOELS, as parents of Decedent ISAIAH SHOELS, Plaintiffs,	)
v.	)
JEFFERSON COUNTY SHERIFF JOHN STONE, Individually and in his Official Capacity, et al., Defendants.	)

Judge Robert E. Blackburn

ORDER GRANTING MOTIONS TO ENFORCE SETTLEMENT AGREEMENT

Blackburn, J.

This matter is before me on the following motions: 1) the Motion to Enforce Settlement Agreement filed by defendants Thomas and Susan Klebold [# 128], filed July 9, 2002; and 2)

the Motion to Enforce Settlement Agreement filed by defendants Wayne and Katherine Harris [# 134;], filed July 11, 2002. For the reasons discussed below, the motions to enforce settlement agreement are granted.

The Klebolds and the Harrises, who are defendants in this case, argue that they reached a settlement agreement with the plaintiffs, Michael and Vonda Shoels. The Shoels claim that no settlement agreement ever was reached between themselves and the Harrises or the Klebolds. I have reviewed the motions, the Shoels' response, and the Harris and Klebold's replies. In addition, I heard evidence and argument on the two motions at a hearing held on March 14, 2003. I am acting under authority of Chief Judge Babcock's Order [# 146], filed August 22, 2002, transferring this matter to me for the limited purpose of resolving the two motions to enforce settlement.

FACTS

The Shoels' suit against the Klebolds, the Harrises, and others arises from the death of the Shoels' son, Isaiah, in the shootings at Columbine High School in April, 1999. As of April, 2001, there was a group of 36 known potential claimants who were asserting claims arising from the shooting. An effort was undertaken to reach a global settlement among these claimants and the Klebolds, the Harrises, and other defendants. During this settlement effort, some of the claimants decided not to participate in the group settlement discussions. The non-participating group consisted of six claimant families who were represented by James Rouse, as well as four other families. The families represented by James Rouse often are referred to as the "Rouse group."

During the settlement negotiations, the Shoels were represented by local counsel, Jack Beam and Doug Raymond,

as well as out of state counsel, Geoffrey Fieger. Stephen Wahlberg, an attorney who represented two of the claimants, acted as a spokesperson for the claimants in negotiations with attorneys for the defendants and with mediators being used by the parties. It is undisputed that Mr. Wahlberg never had authority to settle the Shoels' claims or to bind the Shoels in any way. Rather, Mr. Wahlberg simply acted as a conduit of information among the numerous parties involved.

In early March, 2001, the Klebolds, the Harrises, and three other defendants proposed a settlement to the participating group of claimants. *Klebolds' Motion to Enforce Settlement Agreement,* Exhibit B (Wahlberg Affidavit), pp. 2-3. The key terms of this proposal are outlined in Mr. Wahlberg's affidavit. Wahlberg Affidavit, pp. 2-3, The proposal included the arbitration of the various competing claims by a former judge. On March 8, 2001, Mr. Wahlberg spoke to Mr. Fieger and described the current state of the defendants' offers and the proposed arbitration procedure. Wahlberg Affidavit, ¶ 5. Mr. Fieger suggested that each of the plaintiffs' death claims should be treated equally under the arbitration procedure. Testimony at the hearing indicated that the participating claimants who had claims based on the death of a family member all agreed that non-economic damages for all death claims would be valued at the statutory cap of $366,000 for the purposes of the arbitration procedure. Mr. Wahlberg testified that he submitted a letter to plaintiffs' counsel asking if they concurred with such an arrangement. They all concurred that such a valuation of death claims was agreeable. This stipulation, however, was not included among the written terms of the arbitration agreement.

On March 14, 2001, Mr. Wahlberg faxed to counsel for the Shoels a letter from Mr. Rouse stating that his clients would not participate in the arbitration as it applied to the

Harrises and the Klebolds, Wahlberg Affidavit, ¶ 11. On April 9, 2001, Mr. Wahlberg communicated with counsel for the Shoels and told him that Mr. Rouse had indicated that his clients would participate in the arbitration with respect to some of the defendants, but not as to the Harrises and Klebolds. Wahlberg Affidavit, ¶ 12. In addition, Mr. Wahlberg indicated that it was possible that some of Mr. Rouse's clients would settle their claims against the Harrises and the Klebolds, Wahlberg Affidavit, ¶ 12.

On April 10, 2001, Mr. Wahlberg and numerous other attorneys attended a settlement conference conducted by the Judicial Arbiter Group. The Judicial Arbiter Group is a mediation firm that had been selected to assess the various claims and distribute the available proceeds under the terms of the proposed settlement. On April 13, 2001, Mr. Wahlberg wrote to Mr. Beam, one of the Shoels' local counsel, forwarding an agreement for arbitration and requesting that the agreement be executed on behalf of the Shoels. *Response*, Exhibit F (Raymond Affidavit), Exhibit D. In that letter, Mr. Wahlberg said: "I understand that everyone else has signed the agreement, and we need the Schoels' signature to proceed. *Id.* On April 16, 2001, Mr. Wahlberg communicated with the Shoels' counsel and outlined the settlement offer from the Harris and Klebold families. Wahlberg Affidavit, ¶ 13. Mr. Wahlberg also spoke to Doug Raymond, one of the Shoels' attorneys, discussed the details of the agreement to arbitrate, and discussed in some detail the terms of the agreement. Wahlberg Affidavit, ¶ 13.

On April 19, 2001, Mr. Fieger faxed a letter to Mr. Wahlberg. In that letter, Mr. Fieger said: "This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson, and Duran." *Klebolds' Motion to Enforce,* Exhibit

A. The Harrises and the Klebolds argue that this letter constitutes an acceptance by the Shoels of the Harris and Klebolds' proposed settlement terms.

Mr. Fieger says this letter does not constitute an acceptance of settlement terms proposed by the Harrises and the Klebolds. According to Mr. Fieger, on April 19, 2001, his assistant received a call from Mr. Raymond's office indicating that Mr. Wahlberg had informed Mr. Raymond that all of the plaintiffs had agreed to participate in the arbitration process. Mr. Fieger says his assistant was told that Mr. Wahlberg was requesting a letter acknowledging that the Shoels would participate in the process. Mr. Fieger says he told his assistant to draft a short letter indicating that the Shoels would participate in the process. His assistant then wrote, signed, and faxed the April 19, 2001, letter. According to Mr. Fieger, no settlement terms had been proposed at this point in time. As a result, Mr. Fieger argues, his April 19th letter could not constitute an acceptance of a settlement agreement because specific terms had not been proposed.

On April 19, 2001, after Mr. Fieger had faxed his letter, Mr. Wahlberg faxed a letter to counsel for the Harrises and the Klebolds. *Klebolds' Motion to Enforce Settlement Agreement, Exhibit* C. Although this letter is dated April 18, 2001, the testimony at the hearing established that this letter was not faxed until April 19, 2001, after Mr. Fieger had faxed his letter dated April 19, 2001. Mr. Wahlberg's letter again summarizes the terms of the settlement agreement.

The following day, April 20, 2001 a series of letters was written challenging the existence of a settlement. Mr. Raymond, local counsel for the Shoels, wrote a letter stating that "we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include

Rouse's group as to Klebold and Harris." *Response,* Exhibit D. In a separate letter, Mr. Raymond stated that the Shoels would not participate in the settlement unless they "can get the full deal in writing." *Response*, Exhibit G. Mr. Raymond again expressed displeasure with the fact that the Rouse group was not participating. Mr. Wahlberg responded, again summarizing the terms of the agreement and noting that the Rouse group had not agreed to participate. Response, Exhibit E.

APPLICATION OF LEGAL STANDARDS

A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *U.S. v. Hardage,* 982 F.2d 1491, 1496 (10th Cir. 1993) (citations omitted). A settlement agreement is a contract which will be construed using ordinary principles of contract interpretation. *Anthony v. U.S.,* 987 F.2d 670, 673 (10th Cir. 1993) Questions concerning the formation, construction, and enforcement of a settlement agreement are resolved by applying state law. *U.S. v. McCall,* 235 F.3d. 1211, 1215 (10th Cir. 2000) A party seeking to prove the existence of a valid settlement agreement must show a meeting of the minds on the essential terms of the agreement, and an exchange of consideration. *See, e.g., Van Schaack Holdings, Ltd. v. Fulenwider,* 798 P.2d 424, 431 (Colo. 1990).

Applying these standards, I conclude that the Harrises and the Klebolds proposed a settlement to the Shoels when they negotiated the terms of an arbitration agreement, including a stipulation that all death claims would be treated equally, with counsel for the Shoels and other plaintiffs' counsel. I find that this proposal was relayed to counsel for the Shoels on or before April 16, 2001. I find that the proposal contained the

essential terms of a settlement agreement. I further find that the Shoels accepted these terms when Mr. Fieger faxed his letter, dated April 19, 2001, to Mr. Wahlberg. I find that the parties had agreed that Mr. Wahlberg could act to relay information among the various parties, and thus was authorized to relay this acceptance to counsel for the Harrises and the Klebolds.

After reviewing the parties' filings and having heard evidence and argument at the hearing, I conclude that there are two key disputes here. First, the Shoels argue that as of April 19, 2001, the terms of any proposed settlement were too indefinite to permit the formation of a contract of settlement. Again, absent an offer defining the essential terms of an agreement, an acceptance of an offer does not form a contract.

Second, the Shoels argue that Mr. Wahlberg's April 13, 2001, letter represented that all of the claimants would participate in the arbitration, including the Rouse group. According to the Shoels, if they did accept a settlement offer, this acceptance was based on Mr. Wahlberg's representation that the Rouse group was participating. When the Shoels' counsel discovered that the Rouse group was not participating, the Shoels' counsel objected and attempted to withdraw their purported acceptance. The Shoels argue that any acceptance they offered was not valid because it was based on the mistaken understanding that the Rouse group was participating.

1. Essential Terms. Most of the essential terms of the settlement agreement were defined in the proposed arbitration agreement that circulated among the parties in March and April of 2001. Mr. Fieger participated in the development of these terms. The key term that is not stated in the arbitration agreement is the agreement that all death claims would be

valued at the statutory maximum value of $366,000. The evidence in the record establishes, however, that the participating claimants, including the Shoels, had agreed to such a valuation of death claims in the arbitration procedure.

On April 13, 2001, Mr. Wahlberg forwarded a proposed arbitration agreement to Mr. Beam, the Shoels' local counsel, along with a request that the agreement be signed on behalf of the Shoels. *Response,* Exhibit F (Raymond Affidavit), Exhibit D. Again, the Shoels' counsel had participated in the development of this agreement. The arbitration agreement, combined with the stipulation to value all death claims a $366,000, encompasses all of the terms essential to a settlement of the Shoels' claims. The proposed arbitration agreement contains detailed procedures and formulas for determining how much the Shoels, other participating plaintiffs, and non-participating claimants, would be awarded in arbitration. *Response,* Exhibit F (Raymond Affidavit), Exhibit E (arbitration agreement, including subsequent modifications). It describes the nature of the claim at issue, and provides a means for determining an amount of money to be paid to the Shoels on behalf of the Klebolds, the Harrises, and others. Further, it provides that the Shoels, as claimants, would waive their right to have their claim determined in state or federal court. *Id.* In short, the proposed arbitration agreement along with the stipulated valuation of death claims provided an offer reflecting all of the essential terms of a settlement agreement, and a proposed exchange of valid consideration between the Shoels on one hand and the Harrises and the Klebolds on the other.

These terms were discussed again between Mr. Wahlberg and Mr. Raymond on April 16, 2001. On April 19, 2001, three days later, Mr. Fieger faxed his letter stating that the Shoels had "approved settlement with Defendants Klebold,

Harris, Manes, Anderson, and Duran." *Klebold's Motion to Enforce,* Exhibit A. In the context described above, this reasonably can be viewed as an acceptance of the specific terms proposed in the arbitration agreement.

In the Shoels' response to the motions to enforce, Mr. Fieger says his April 19, 2001, letter "was mis-worded since it was not my intent to 'settle' the Shoels' claims since no offer had ever been made." *Response,* p. 6. Rather, Mr. Fieger says his intent was to indicate the Shoels' "willingness to participate in exploring settlement, based on our understanding that all other attorneys had agreed to participate." *Id.* He says he instructed his assistant to write a short letter indicating that the Shoels "would participate in the process." *Id.* He says his assistant mis-worded the letter to indicate that a settlement had been accepted. Mr. Fieger provided similar testimony at the hearing.

I conclude that Mr. Fieger's claim that his April 19, 2001, letter was mis-worded is not credible. In the weeks and days immediately preceding this letter, the specific terms of a settlement had been discussed among the parties, the terms had been refined, and the Shoels' acceptance of those terms had been solicited. Whether the Shoels would accept these terms was the question at issue on April 19th. In this context, an approval of settlement has clear import. In this context, an indication of willingness to "participate in exploring settlement" has little import. The parties already had been exploring settlement. Further, on April 20 th Mr. Raymond, Mr. Fieger's co-counsel, wrote a letter indicating that "(w)e were not shocked that there was a settlement. We were shocked that there was a settlement that did not include the Rouse's group as to Klebold and Harris." *Response,* Exhibit D. In other words, one day after Mr. Fieger's letter, his co-

counsel indicated that a particular settlement proposal was the issue in question when Mr. Fieger's April 19th letter was sent.

Therefore, I conclude that the Shoels, via Mr. Fieger's April 19, 2001, letter, accepted an offer by the Harrises and the Klebolds to settle the Shoels' claims on the terms outlined in the proposed arbitration agreement supplemented by the stipulation to value death claims at $366,000. I further find that the arbitration agreement in the form included in Mr. Wahlberg's April 13, 2001, letter, combined with that stipulation to value death claims at $366,000, contains all terms essential to settlement of these claims, as well as an agreement for exchange of valid consideration.

2. *Participation of Rouse Group.* As the agreement was being developed in the Spring of 2001, the parties all were aware that Mr. Rouse's clients had expressed their unwillingness to settle with the Harrises and the Klebolds. This fact was noted in Mr. Wahlberg's March 14, 2001 fax to the Shoels' counsel, Wahlberg Affidavit, ¶ 11, and in Mr. Wahlberg's April 9, 2001, correspondence with the Shoels' counsel. Wahlberg Affidavit, ¶ 12.

Counsel for the Shoels repeatedly note that Mr. Wahlberg's April 13, 2001, letter said that "everyone else has signed the agreement, and we need the Schoels' signature to proceed." The Shoels claim that this statement led them to believe that the Rouse group also had agreed to participate in the settlement. The Rouse group consistently had excluded themselves from this process and that fact had been noted shortly before Mr. Wahlberg sent his April 13, 2001, letter. Under the circumstances as they existed on April 13, 2001, I find that Mr. Wahlberg's statement that "everyone else has signed" could not reasonably be read by the parties as indicating that the Rouse group had decided to participate in

the proposed arbitration process with the Harrises and the Klebolds. Rather, under the circumstances, the only reasonable reading of this phrase was that all of the claimants who previously had indicated a willingness to participate in arbitration had signed the agreement.

Under these circumstances, the Shoels cannot reasonably claim that they accepted the terms of the arbitration agreement based on the erroneous assumption that the Rouse group also was participating. The one phrase in Mr. Wahlberg's April 13, 2001, letter does not support such an assumption.

CONCLUSION

The Harrises and the Klebolds made a proposal to the Shoels which contained the essential terms of a settlement agreement. The Shoels accepted this proposal, and there was no mistake of fact concerning the involvement of the Rouse group. The settlement agreement is valid and enforceable.

THEREFORE IT IS ORDERED as follows:

1) That the Motion to Enforce Settlement Agreement filed by defendants Thomas and Susan Klebold [# 128], filed July 9, 2002, is **GRANTED**;

2) That the Motion to Enforce Settlement Agreement filed by defendants Wayne and Katherine Harris [# 134], filed July 11, 2002, is **GRANTED**;

3) That the Shoels' request of Rule 11 sanctions, as stated in their response to the motions to enforce, is **DENIED**;

4) That the plaintiffs Michael Shoels and Vonda Shoels, and defendants Thomas and Susan Klebold, and Wayne and Katherine Harris, shall execute a copy of the arbitration agreement in the form shown in the plaintiffs' response to the motion to enforce settlement agreement [# 138}, filed July 22,

2002, Exhibit F (Raymond Affidavit), Exhibit E (Agreement for Arbitration), excluding the sentence above the signature lines which reads: "This agreement shall apply only as to MARK MANES, PHILLIP J. DURAN and ROBYN ANDERSON; not as to the HARRISES and KLEBOLDS";

5) "That the plaintiffs and the defendants shall execute a written statement agreeing that, for the purpose of applying the terms of the Agreement for Arbitration, the value of the plaintiffs' wrongful death claim is stipulated to be $366,000,00;

6) That the documents described in paragraphs 4) and 5), above, shall be executed by the plaintiffs and the defendants on or before July 14, 2003; and

7) That this court shall retain jurisdiction of this case for the purpose of enforcement of the settlement agreement and this order.

Dated at Denver, Colorado this 23rd day of June, 2003.

BY THE COURT:

/s/ _____
Robert E. Blackburn
United States District Judge

(2)

No. 04-710

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHAEL SHOELS AND VONDA SHOELS,
AS PARENTS OF DECEDENT ISAIAH SHOELS,

Petitioners,

v.

THOMAS KLEBOLD AND SUSAN KLEBOLD,
WAYNE HARRIS AND KATHERINE HARRIS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS WAYNE HARRIS' AND KATHERINE HARRIS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit Court of Appeals correctly affirm the district court's order holding that Michael and Vonda Shoels, as parents of Decedent Isaiah Shoels, entered into binding settlement agreements with Thomas and Susan Klebold and Wayne and Katherine Harris?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings on the Petition for Certiorari are all contained in the caption of the case. All parties are individuals.

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STATEMENT OF THE CASE

The Petitioners have filed a Petition for Writ of Certiorari on the issue of whether the Tenth Circuit erred in affirming the district court's order granting motions to enforce settlements. The Petitioners' Statement of the Case contains a mix of argument and fact, emphasizing certain evidence and minimizing or excluding other evidence. Set forth below are the relevant facts as determined by the district court and referenced in its opinion and the opinion of the Tenth Circuit Court of Appeals.

During late 2000 and into the first several months of 2001, an effort was undertaken to reach a global settlement among a group of 36 claimants who were asserting claims against Thomas and Susan Klebold, Wayne and Katherine Harris, and other defendants arising from the Columbine High School shootings. During the settlement negotiations, the Petitioners herein, Michael and Vonda Shoels, the parents of Isaiah Shoels, one of the students killed during the shootings at Columbine, were represented by local counsel, Jack Beam and Doug Raymond, as well as out of state counsel, Geoffrey Fieger. App. 7a, 35a-36a.

During the referenced settlement effort, some of the claimants decided not to participate in the group settlement discussions including six claimant families who were represented by James Rouse, (the "Rouse group") and several others. App. 8a, 35a.

Stephen Wahlberg, a local Denver attorney, emerged as the primary spokesperson for the participating group of claimants in negotiations with attorneys for the defendants and with the Judicial Arbiter Group, a local mediation/arbitration firm. Mr. Wahlberg was not authorized to

act on behalf of any other attorneys' clients; however, he acted as a conduit of information or intermediary among the numerous parties involved, relaying communications back and forth between the various defendants and the various plaintiffs. App. 7a, 36a.

In early March 2001, the Klebolds and Harrises, among other defendants, proposed a settlement to the participating group of claimants. The proposal included the arbitration of the various competing claims by the Honorable Jim Carrigan, a former federal judge. App. 8a, 36a, 37a.

On March 8, 2001, Mr. Wahlberg spoke to Mr. Fieger and described the current state of the defendants' offers and the proposed arbitration procedure. Mr. Fieger suggested that each of the death claims should be treated equally under the arbitration procedure. Participating claimants who had death claims based on the death of a family member all agreed that non-economic damages for all death claims would be valued at the statutory cap of $366,000 for the purposes of the arbitration procedure. Mr. Wahlberg submitted a letter to plaintiffs' counsel asking if they concurred with such an arrangement. They all concurred that such a valuation of death claims was agreeable. App. 36a, 41a.

On March 14, 2001, Mr. Wahlberg faxed to counsel for the Shoels a letter from Mr. Rouse stating that Mr. Rouse's clients would not participate in the arbitration as it applied to the Harrises and the Klebolds. App. 9a, 36a-37a.

On April 9, 2001, Mr. Wahlberg communicated with counsel for the Shoels and told them that Mr. Rouse had indicated that his clients would participate in the

arbitration with respect to some of the defendants, but not as to the Harrises and Klebolds. App. 9a, 37a.

In an April 16, 2001 letter to counsel for the Shoels and counsel for other claimants, Mr. Wahlberg outlined, *inter alia*, a settlement offer from the Harrises and Klebolds. The letter advised that the Harrises and Klebolds had agreed to put 98% of their insurance policy limits ($1,568,000) into escrow, leaving the other 2% to cover possible zone of danger claims. Thereafter, the arbiter was to determine what share of the escrowed funds each potential claimant (including non-settling claimants) should receive. The amounts attributable to non-settling plaintiffs would be held in reserve to cover any successful claims and any unused portion of those funds would be distributed to the settling plaintiffs after the statute of limitations expired. App. 9a-10a.

The letter noted that the Rouse plaintiffs were not participating in settlement with the Klebolds and Harrises, but suggested they would participate in other settlements. Mr. Wahlberg also spoke to Doug Raymond, one of the Shoels' local attorneys, discussed the details of the agreement to arbitrate, and discussed the terms of the agreement. App. 9a-10a, 41a.

On April 18, 2001, Mr. Wahlberg called Shoels' counsel, Doug Raymond, and told him that the Rouse group was on board to settle with three defendants, Manes, Anderson and Duran and that he needed to know what the Shoels were doing and asked to have the Shoels' counsel put it in writing. App. 10a-11a, 37a.

Late in the evening on April 18, 2001 or the morning of April 19, 2001, Mr. Wahlberg had another conversation with Mr. Raymond and someone in Mr. Fieger's office, and

reiterated to the person in Mr. Fieger's office that whatever the Shoels decide to do, he needed something in writing. App. 11a.

On April 18, 2001, Mr. Wahlberg dictated a letter to counsel for the Harrises and Klebolds, as well as counsel for Manes, Anderson and Duran, stating that the Harris and Klebold offer was accepted by the claimants. This letter, however, was not sent on April 18, 2001. Instead, the letter was held by Mr. Wahlberg because he had not yet heard from Mr. Fieger as to what the Shoels were doing about settling. App. 38a.

On April 19, 2001, lead counsel for the Shoels, Geoffrey Fieger, sent a letter to Mr. Wahlberg which stated:

> This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson and Duran.

App. 11a-12a, 37a, 42a.

After Mr. Wahlberg received the April 19, 2001 letter from Mr. Fieger at 12:28 eastern time (10:28 mountain time), Mr. Wahlberg faxed Mr. Fieger's letter to all claimants' counsel and defense counsel approximately 10 minutes later at 10:39 a.m., mountain time. The April 19, 2001 letter written by Mr. Fieger was received by counsel for the Harrises and the Klebolds. App. 12a, 38a.

Mr. Wahlberg then edited his letter of April 18, 2001 to reflect the acceptance by Shoels, though he neglected to change the date of the letter, and faxed it to counsel for the Harrises and the Klebolds, as well as all claimants' counsel on April 19, 2001 at 1:09 p.m., mountain time, along with a listing of the claimants whose claims were settled.

Included in that list was Isaiah Shoels whose name was inserted in that list based on the April 19, 2001 letter from Mr. Fieger. App. 12a, 38a.

On April 20, 2001, counsel for the Shoels sent two letters to Mr. Wahlberg. App. 12a, 38a-39a. The first letter stated, in part:

> Notwithstanding the April 19, 2001 letter to you from Geoffrey Fieger that the Shoels have tentatively approved settlement with Klebold, Harris, Manes, Duran and Anderson, the Shoels will not participate in this settlement unless they can get the full deal in writing.

The second letter stated, in part:

> I want to make it clear to you that we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris.

Mr. Fieger thereafter disavowed that settlement occurred. App. 12a. The Shoels eventually moved to have their case remanded to state court and the Klebolds and Harrises brought motions to enforce the settlement agreement. App. 13a, 34a-35a. After an evidentiary hearing in March of 2003, the district court determined that the Shoels had entered into a binding settlement with the Klebolds and Harrises. App. 34a-45a.

On appeal to the Tenth Circuit, the Shoels argued that 1) Mr. Fieger did not have his clients' authority to settle the claims; 2) the terms of the settlement were too indefinite to constitute a binding agreement; and 3) their mistake about the Rouse group's participation, which they claim was caused by Mr. Wahlberg's misrepresentation, gave them opportunity to void the contract. The Tenth

Circuit determined that the issue of whether Mr. Fieger had his clients' authority to settle was not raised in the district court, but that, even if the issue was proper on appeal, there was no evidence to show Mr. Fieger did not have such authority. The Tenth Circuit agreed with the district court that the settlement was sufficiently definite to form a binding contract. Finally, the Tenth Circuit held that the Shoels could not void the contract on the basis of mistake or misrepresentation. App. 4a-33a.

REASONS THE PETITION SHOULD BE DENIED

I. THE TENTH CIRCUIT COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTION SUCH DEPARTURE BY A LOWER COURT SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The district court's factual findings concerning the settlement were made after an evidentiary hearing with full opportunity for the parties to present witnesses and evidence. The Tenth Circuit correctly determined that the district court's findings were not clearly erroneous and properly did not disturb the district court's credibility findings. The Tenth Circuit did not depart from the accepted and usual course of judicial proceeding nor sanction such a departure by a lower court and there is no reason for this Court to exercise its discretion to grant the Petition for Writ of Certiorari.

A. Petitioners' Argument That They Were Denied Their Seventh Amendment Right To A Jury Trial Was Never Raised In The Courts Below

Petitioners argue for the first time in their Petition for Writ of Certiorari that they were denied their Seventh Amendment rights when the district court held that they entered into a binding settlement agreement. The Shoels did not raise the Seventh Amendment as an issue for the district court to consider or decide, nor did the Shoels raise the issue during their appeal to the Tenth Circuit. Ordinarily, the United States Supreme Court does not decide questions not raised or resolved in the lower court. *See Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976). Only in exceptional circumstances will this Court entertain issues not raised in the lower court. *Lawn v. U.S.*, 355 U.S. 339, 78 S.Ct. 311 (1958).

A trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it. *United States v. Hardage*, 982 F.2d. 1491, 1496 (10th Cir. 1993). The decision of the district court here was based on a full evidentiary hearing and the enforcement of a settlement agreement under the circumstances does not give rise to an issue of Seventh Amendment constitutional import. While the Columbine shooting was indeed a tragic event for Colorado and the Nation, the legal issues and the decision by the district court to enforce settlement are otherwise unremarkable in nature and no exceptional circumstances exist here to warrant review by this Court of an issue not raised in the lower courts. The Petitioners' Seventh Amendment argument is misplaced and the Court should properly deny the Petitioners' Petition for Writ of Certiorari.

B. The Tenth Circuit Court of Appeals Properly Affirmed The District Court's Findings That Mr. Fieger Had Authority To Settle The Shoels' Claims

The Tenth Circuit correctly determined that it would be improper for them to reverse the district court on the alleged "lack-of-authority" claim because the issue was not raised in the district court. App. 17a. Mr. Fieger's claim that he did not have authority from his clients to settle was first raised on appeal to the Tenth Circuit. The Tenth Circuit aptly noted:

> Had this issue been properly raised below, both sides could have presented evidence (including perhaps, the crucial testimony of Mr. and Mrs. Shoels) about what the Shoels knew and what they authorized, rather than focusing on Mr. Fieger's intent to settle (which is irrelevant if he lacked authority to settle in the first place).

App. 18a.

Further, upholding the district court's findings, the Tenth Circuit properly determined that there was sufficient evidence to support the finding that Mr. Fieger had the authority to settle the Shoels' claims. App. 16a. There is a presumption that an attorney has express authority to settle unless there is evidence to the contrary in the record. *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966). A settlement and subsequent judgment entered upon an agreement by the attorney of record will be set aside only upon affirmative proof by the party seeking to vacate the settlement and judgment that the attorney had no right to consent to its entry. *See id.*

As found by the district and circuit courts, there was no affirmative proof in the record that Mr. Fieger lacked authority to settle with the Harrises and the Klebolds. Mr. and Mrs. Shoels did not provide any affidavits or testimony in this matter. Indeed, Plaintiffs' argument on this issue centers on Mr. Fieger's own disavowal of the April 19, 2001 letter sent by him which unequivocally accepted settlement with the Harrises and the Klebolds. Mr. Fieger claimed in his testimony and in his briefing below that this "mis-worded" letter was written by his assistant and was only intended to indicate a "willingness to participate in exploring settlement."

In assessing the facts and the credibility of the witnesses, the district court found that Mr. Fieger's claim that his April 19, 2001 letter was mis-worded was *not credible*. App. 11a, footnote 2, 16a, 42a. The Tenth Circuit concluded that:

> In light of the language of Mr. Fieger's letter and the presumption that an attorney does not act without authorization, the most natural conclusion is that the Shoels also intended to settle. Indeed, there was no hint of a division between the Shoels and their counsel in the proceedings below.

App. 16a.

Moreover, as acknowledged by the district court, Mr. Fieger's suggestion that his letter was not a confirmation of settlement is further belied by the subsequent communications from Mr. Fieger's co-counsel, Douglas Raymond, on April 20, 2001. App. 42a-43a. The first letter from Mr. Raymond stated:

> Notwithstanding the April 19, 2001 letter to you from Geoffrey Fieger **that the Shoels have tentatively approved settlement with Klebold, Harris, Manes, Duran and Anderson**, the Shoels will not participate in this settlement unless they can get the full deal in writing. (emphasis added).

Interestingly, Mr. Raymond's own spin on the April 19, 2001 letter was that the settlement approval set forth in the April 19, 2001 letter was a "tentative" approval of settlement. Such interpretation is nonsense; the April 19, 2001 letter is absolute and unconditional. App. 19a. In any event, Mr. Raymond believed that Mr. Fieger's letter communicated approval of settlement with the Harrises and Klebolds.

Moreover, Mr. Raymond's second letter on April 20, 2001 is even more telling and confirms that the settlement took place:

> I want to make it clear to you that we were not shocked that there was a settlement. We were shocked that there was a settlement that did not include Rouse's group as to Klebold and Harris.

As the district court pointed out, "one day after Mr. Fieger's letter, his co-counsel indicated that a particular settlement proposal was the issue in question when Mr. Fieger's April 19, 2001 letter was sent." App. 42a-43a. Mr. Raymond's April 20, 2001 letters were not an attempt to claim that the unambiguous language of the April 19, 2001 letter was "mis-worded."

There was no suggestion at the time by any of the Shoels' attorneys that the Shoels had not provided Mr. Fieger with authority to settle with the Harrises and

Klebolds. Likewise, there was no credible evidence in the materials filed with the Court nor in the evidence presented at the evidentiary hearing that the Shoels had not given Mr. Fieger authority to settle with the Harrises and Klebolds. Indeed, Mr. Fieger testified that it was he who had the authority to act directly in negotiations on behalf of the Shoels and it was only he who maintained contact with the Shoels and that he would be the conduit of information so there would be no confusion.

As the testimony of Mr. Fieger concerning his letter was not found to be credible and because the other facts belie the Petitioners' position, the Petitioners' attempt to advance Mr. Fieger's testimony as evidence supporting the position that Mr. Fieger did not have authority is improper and fails to raise any issue for this Court to review.

Furthermore, the argument that Mr. Fieger could not have had authority to settle because the Shoels had consistently refused to settle without knowing in advance what they would receive was soundly rejected by the district court and Tenth Circuit. The Petitioners misstate the evidence in this regard. The Tenth Circuit correctly noted the Shoels' settlement intentions notwithstanding that they only knew of the procedure for determining settlement but not the exact dollar amount they would receive:

> [E]ven if Mr. Fieger's long refusal to settle except in return for a fixed dollar amount were probative of a corresponding limitation on his authority, **his apparent willingness to settle so long as the Rouse group settled – even before the arbiter had determined what the Shoels**

> **would receive** – would be just as probative of his authority to do so. (emphasis added).

App. 15a-16a.

The cases cited by Petitioners are inapposite and misapplied by them in the Petition for Writ of Certiorari. In *Hallack v. Loft*, 19 Colo. 74, 34 P. 568 (Colo. 1893), the client himself testified that his attorneys were never authorized to settle his suit and testified "positively that he never settled the cause, nor agreed to dismiss it, and never gave his attorneys, or either of them, authority so to do it. . . . This testimony was not contradicted in any manner." *Id.* at 83. Here, the Shoels were not called to testify and no other evidence was presented that Mr. Fieger was not authorized to settle the Shoels' claims. Indeed, the testimony and evidence was that Mr. Fieger was the only one who could do it.

In *Cross v. District Court,* 643 P.2d 39 (Colo. 1982), the record demonstrated that the attorney who purportedly settled the case for his client had never met, corresponded, nor conversed with the client or his other personal counsel. *Id.* at 41. Here, the evidence demonstrates that Mr. Fieger was the exclusive contact with the Shoels. Further, in *Cross*, the attorney testified that he disclaimed his authority to settle the case within hours after his purported statements that were construed to settle the case. *Id.* Here, there was never any disclaimer of Mr. Fieger's authority (until the issue was untimely raised by Mr. Fieger for the first time on appeal to the Tenth Circuit). Moreover, Mr. Fieger's letter of April 19, 2001 unequivocally states: "This letter shall serve to confirm that **Mr. and Mrs. Shoels have approved settlement** with Defendants Klebold, Harris, Manes, Anderson and Duran,"

(emphasis added) and the two April 20, 2001 letters from Mr. Fieger's co-counsel, Doug Raymond, never once question or contend that Mr. Fieger was without authority to settle the claims.

Likewise in *Radosevitch v. Pegues*, 133 Colo. 148, 292 P.2d 741 (Colo. 1956), the evidence was "undisputed" that the attorney had stated he had no authority from his client to dismiss or settle his client's counterclaim as part of the settlement of the claim against his client. Further, the record was that it was expressly stated and intended as part of the settlement agreement that the settlement would not encompass the counterclaim. *Id.* at 150. The Court of Appeals found that the district court erroneously concluded that the settlement of the claim also operated as settlement of the counterclaim. *Id.* at 152. Here again, by contrast, Mr. Fieger never stated until the appeal that he did not have authority from his clients to settle their claims nor have Mr. and Mrs. Shoels ever stated that Mr. Fieger did not have authority to settle their claims. Further, unlike the settlement documentation in *Radosovitch*, Mr. Fieger's letter of April 19, 2001 was unequivocal in its language. There was no reservation of any kind in that letter.

In *Lewis v. Vache*, 92 Colo. 358, 20 P.2d 554 (Colo. 1933) the evidence was undisputed, as presented by the testimony of the client and her attorney, that the client had expressly instructed her attorney not to compromise. *Id.* at 362. Here, there is no evidence that the Shoels instructed their attorneys not to settle their claims. The testimony of Mr. Fieger that the Shoels would not settle because they did not know the exact amount that they would get is incredible and is not supported by any direct testimony or affidavit from either Mr. or Mrs. Shoels and

is otherwise belied by other evidence in the case. The district court, on the facts and credibility of the witnesses, properly resolved this issue in favor of the Harrises and Klebolds and did not abuse its discretion.

The Court in *Thomas*, 366 F.2d at 139-140, held that one of the clients, who was aware that the negotiations were taking place, had failed to establish that the attorney did not have authority to enter into the stipulation. As to this client, the Tenth Circuit held that the district court had not abused its discretion in refusing to set aside the settlement. *Id.* at 139-140. Like the client in *Thomas* whose settlement was not set aside, the Shoels failed to offer any credible evidence that Mr. Fieger did not have authority to settle their claims. The district court did not abuse its discretion in making its factual determinations.

Hayes v. Eagle-Picher Industries, Inc., 513 F.2d 892 (10th Cir. 1975) is entirely inapposite. There, the attorney represented a group of plaintiffs, some of whom wished to settle, some of whom did not. *Id.* at 892-893. The attorney knew that some of his clients did not want to settle, but, believing that his clients had agreed to be bound by the majority rule, compromised the claims. *Id.* at 893 n.1. The clients who did not want to settle immediately repudiated the settlement. *Id.* at 893. The district court upheld the settlement and dismissal of the claims. *Id.* The Tenth Circuit held that the "majority rule" arrangement was violative of the basic tenants of the attorney client relationship. *Id.* at 894-895. Here, there is no such "majority rule" issue. *Hayes* has no bearing on this case.

Accordingly, the decisions of the district court and the Tenth Circuit Court of Appeals were consistent with

established law and the evidence and this Court should not grant certiorari to review them.

C. The District Court And Tenth Circuit Court of Appeals Correctly Determined That The Terms Of The Settlement Agreement Were Sufficient

In support of the district court's Order Granting Motions to Enforce Settlement Agreement, the district court received substantial evidence and found that the facts supported the finding that the Harrises and the Klebolds made a settlement offer to the Shoels, that the offer was accepted and that there was sufficient consideration. The district court made extensive findings of fact which support the existence and content of the settlement agreement and the Tenth Circuit correctly determined that the district court did not abuse its discretion.

1. The Offer

While the terms of the offer did not contain the exact dollar amount that the Shoels would receive (the main point of argument advanced by the Shoels), it contained a method by which such amount could be calculated. This is sufficient under Colorado law.

Even where a "price term" is essential, the contact is not void if there is a precise method of settling that term. *See, e.g., Greater Service Homebuilders' Inv. Assn. v. Albright*, 88 Colo. 146, 293 P. 345, 348 (1930) (contract is not void if there is a method of settling essential terms.)

> A contract is not void for uncertainty, even though it does not enter into all the details with respect to its subject matter, if, according to its

> terms, it is sufficiently definite so that it can be ascertained with a reasonable degree of certainty what the parties intended to agree to. Thus tested, the terms of the agreement with respect to each can be readily ascertained.

Fisk Min. & Mill. Co. v. Reed, 32 Colo. 506, 510, 511, 77 P. 240, 241 (Colo. 1903) (Where the contract provided that, in consideration of the plaintiffs' pumping the water from all the properties, the defendant should pay them its proportion of the expense of such pumping, the Court stated "the parties did not agree in specific terms how many dollars each should contribute to the expense of drainage, nor what aliquot part of such expense each should bear, but they did agree how the sum which the defendant should pay should be determined.")

The district court properly determined under the law of Colorado and under the facts that the offer from the Harrises and Klebolds was not lacking in essential terms and the Tenth Circuit Court of Appeals properly affirmed the district court's order. App. 16a, 41a.

2. The Acceptance

The district court properly found that on April 19, 2001, the Shoels, through their counsel, Mr. Fieger, accepted the offer from the Harrises and Klebolds. App. 41a-42a. Mr. Fieger's April 19, 2001 letter stated in no uncertain terms:

> This letter shall serve to confirm that Mr. and Mrs. Shoels have approved settlement with Defendants Klebold, Harris, Manes, Anderson and Duran.

In addition to being supported by the record facts, the district court's finding that there was an acceptance was

based on determinations of credibility. App. 42a. Nothing in the record suggests the district court's credibility determinations were incorrect. The Tenth Circuit correctly gave due regard to the findings of credibility by the district court. *See Eateries, Inc. v. J.R. Simplot Co., a Nevada Corp.*, 346 F.3d 1225, 1233 (10th Cir. 2003) (citing Fed.R.Civ.P. 52). "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512 (1985). The Petitioners' attempt to support their Petition for Writ of Certiorari with Mr. Fieger's discredited testimony concerning the letter is specious.

Accordingly, the district court did not abuse its discretion when it found that there was an offer with essential terms and there was acceptance of that offer and the Tenth Circuit Court of Appeals correctly affirmed the district court's findings. App. 19a, 43a.

3. The Consideration

Finally, the district court properly found that the offer and acceptance were supported by valid consideration. Valid consideration is required to form a contract. *Ireland v. Jacobs*, 163 P.2d 203, 206 (Colo. 1945). Even nominal consideration is sufficient. *Id.* An agreement not to further pursue a valid, legal claim constitutes sufficient consideration. *Russell v. Daniels*, 37 P. 726, 728 (Colo.App. 1894) (agreeing not to pursue a right of appeal).

The record demonstrates that the consideration given by the Shoels was their agreement to not further pursue

their claims against the Harrises and Klebolds and to settle their litigation. The Harrises and Klebolds gave consideration by agreeing to payment of a certain sum, a portion of which would be distributed to the Shoels pursuant to the agreed procedures.

The district court did not abuse its discretion in finding that there was valid consideration supporting the settlement agreement and the Tenth Circuit correctly affirmed the district court's findings. App. 24a, 41a, 43a.

Accordingly, the three parts of a valid contract exist here as supported by the district court's factual findings and credibility determinations. App. 29a.

4. Petitioners' Argument Fails

The Plaintiff's case law citations do not support the Plaintiff's argument. In *Difrancesco v. Particle Interconnect Corporation,* 39 P.3d 1243 (Colo.App. 2001) the court held that the existence of a settlement agreement, like any contract, is a question of fact. *Id.* at 1247. If the terms or existence of a settlement agreement are in dispute, the court must hold an evidentiary hearing. *Id.*

In *Difrancesco*, the appellate court conducted a *de novo* review of the trial court's decision because the judge did not make findings of fact and the district court's ruling was based solely on the interpretation of a written transcript of the settlement events. *Id.* Thus, the dispute was not centered on the facts; rather, on the conclusions to be drawn from the written transcript. *Id.* Here, by contrast, the district court held an evidentiary hearing, received testimony from numerous witnesses and considered all the facts and credibility of witnesses. The district court here

made specific findings of fact and credibility determinations.

Moreover, in *Difrancesco*, the agreement to settle was expressly made "subject to" preparation of a written document, and the evidence plainly showed there was a lack of agreement on admittedly material terms. *Id.* at 1248-1249. Here, the district court, with substantial record support, found that there was no lack of essential terms. The *Difrancesco* court recognized that one term – the royalty rate – was not sufficient because it did not specify how the rate is to be calculated, that no method of reaching specific royalty terms was identified. *Id.* at 1249. By contrast here, because there was a precise method of calculating the amount the Shoels would receive, the district court properly held that the "price term" was sufficient. The Tenth Circuit correctly distinguished *Difrancesco*. App. 20a-21a.

Further, the Tenth Circuit correctly rejected the Shoels' attempt to argue that the Harrises' and Klebolds' settlement was "subject to" the signing of a release and the signing of the Arbitration Agreement. App.22a-23a. The lack of signature on the arbitration agreement did not preclude the existence of the settlement, particularly when the Shoels had already agreed to be part of the arbitration proceedings and particularly when Mr. Fieger unequivocally accepted the offer on April 19, 2001. As for the requirement of a release, the necessity of a release was part of the offer accepted by the Shoels.

The Shoels' argument that because no release was signed there is no contract simply puts the cart before the horse. It was not the signing of the release that created the settlement; the Shoels by settling were obligated to

sign the release. Moreover, Mr. Fieger did not deny that there could have been an agreement to settle without the release or the Arbitration Agreement actually having been signed. The Tenth Circuit properly found that "the district court's determination that there was a binding acceptance has ample record support." App. 24a.

New York Life Ins. Co. v. K.N. Energy, Inc., 80 F.3d 405, 410-411 (10th Cir. 1996) and Petitioner's citation to the Restatement 2d Contracts are inapposite. In *K.N. Energy*, the purported agreement was marked by its use of the conditional tense to describe what "would be" the case if the deal were consummated and it specifically stated that the deal would not be consummated until the parties reached "final agreement upon terms, conditions, covenants and other provisions satisfactory to Prudential." *Id.* at 411. Such is not the case here and the Tenth Circuit properly rejected that case as authoritative. App. 24a. Furthermore, the "price" term in the present case was sufficient because there was a procedure by which the price term would be determined, making the Restatement 2d Contracts also inapplicable.

The district court's Order and the Tenth Circuit's opinion were well reasoned and were correct in their factual and legal findings and conclusions and there is no basis for this Court to grant the Petition for Writ of Certiorari.

D. The District Court And Tenth Circuit Court of Appeals Correctly Determined That There Was No Misrepresentation Or Mistake

The Shoels argue that Mr. Fieger's April 19, 2001 letter was a mistake induced by a material misrepresentation of

fact by Mr. Wahlberg. The Shoels argue that, had they known the Rouse group was not settling with the Harrises and Klebolds, Mr. Fieger would not have sent the April 19, 2001 letter on their behalf settling with the Harrises and Klebolds.

Initially, such argument is inherently and wholly inconsistent with the position taken by the Shoels that the letter of April 19, 2001 was "mis-worded" and that the Shoels by that letter had not agreed to settle. The presentation of this "alternative" theory is rather telling.

Nevertheless, as the district court found on the evidence presented, the Shoels' counsel were aware on April 19, 2001 that the Rouse group was not settling with the Harrises. Because of the extensive and consistent notification to the Shoels that the Rouse group was not participating, the district court properly found that an April 13, 2001 letter that included the phrase "everyone else has signed" could not reasonably be read by the parties as indicating the Rouse group had suddenly decided to participate in the arbitrations as to the Harrises and Klebolds. App. 43a-44a.

In any event, the Tenth Circuit correctly held that a unilateral mistake is not a ground for setting aside an agreement, citing *Royal v. Colorado State Personnel Board*, 690 P.2d 253, 255 (Colo.App. 1984) (enforcing a settlement agreement). The Tenth Circuit also properly rejected the Shoels' arguments 1) that there was no meeting of the minds; 2) that the equities favor setting aside the agreement; or 3) that any mistake was the result of misrepresentation or fraud. App. 26a.

The Tenth Circuit properly rejected the Plaintiff's reliance on *Powder Horn Constructors, Inc. v. City of*

Florence, 754 P.2d 356 (Colo. 1988) and the Restatement 2d Contracts § 153.

The *Powder Horn* court based its decision on policy considerations which are not applicable here:

> In reviewing the competing policy considerations presented here, we conclude that, in the absence of controlling legislation, a bidder for a public construction contract who submits a bid containing a mistake may rescind the bid prior to its acceptance if the bidder establishes by a preponderance of the evidence that the mistake is of a clerical or mathematical nature, that the mistake was made in good faith and relates to a material aspect of the bid, and that the public authority did not rely to its detriment on the mistaken bid.

Id. at 363. These considerations are not pertinent in the present case and the Tenth Circuit's rejection of this case as authoritative was proper. App. 28a-29a.

The Tenth Circuit also correctly rejected the Shoels' Restatement argument, noting that the relief from a unilateral mistake comes only where the contract is unconscionable or where the defendant knew or had reason to know of the mistake. There was no evidence of unconscionability or that the Harrises or Klebolds knew of any alleged mistake or caused any alleged mistake. App. 30a.

Finally, as to the Petitioners' argument that the contract was a product of misrepresentation, the Tenth Circuit correctly rejected this argument. App. 30a-33a. The Tenth Circuit properly concluded: "Misunderstanding, not

misrepresentation, was the basis for Appellants' acceptance, and so they cannot evade the normal limitations on relief from the consequences of their mistake." App. 33a.

CONCLUSION

WHEREFORE, based upon the arguments and authorities set forth herein, Respondents Wayne Harris and Katherine Harris respectfully request that the Court deny the Petition for Writ of Certiorari.

Dated: December 23, 2004.

Respectfully submitted,

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